

Testimony of  
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Impact Study Commission

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It is a pleasure to speak before the Commission on behalf of Governor Pete Wilson with respect to the issue of Indian gaming in California. I serve as Legal Affairs Secretary and Counsel to Governor Wilson. Over the past two years, I have been the Governor's lead negotiator with respect to tribal-state compact negotiations, and have thus far successfully negotiated compacts with eight different tribes.

I. Introduction

California faces several unique challenges under the Indian Gaming Regulatory Act ("IGRA"), which authorizes tribes to request a State to enter into negotiations for purposes of concluding a compact governing the tribes' class III gaming activities.

First, California has more federally recognized tribes than any other State – over one hundred. That means that tribal gaming operations can potentially create a widespread exception to the State's gaming policies. The number of tribes can also make compliance with IGRA's requirement that the State negotiate with each tribe requesting a compact within a 180-day period a real challenge.

Second, California is a non-casino State – by virtue of the California Constitution (Article IV, § 19(e)), and the State penal code. Yet, by virtue of IGRA, the State has a legal obligation to negotiate over the establishment of "casinos" that heretofore have not

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legally existed in California. This, too, affects the ability of the State to maintain its public policy over gaming.

Third, approximately 39 of California's tribes have been engaged in uncompacted and illegal gaming (operating slot machines prohibited under the State penal code) in violation of IGRA. This unfortunate state of affairs has resulted in the operation of not just casinos, but illegal casinos in a non-casino State, over which the State lacks enforcement power. (The federal government instead has jurisdiction over uncompacted gaming activities.) Fortunately, approximately 25% of these tribes have entered, or have agreed to enter, acceptable compacts with the State, thereby complying with the law. Unfortunately, the remainder have refused to bring themselves into compliance with the law.

Accordingly, my testimony will address the following subjects: (1) IGRA and the need to reform it, (2) the circumstances surrounding the tribes' violation of IGRA in California, and (3) the State's efforts through its tribal-state compacts to accommodate the tribes' interests in gaming while seeking to maintain its public policy concerning gaming.

II. IGRA Creates A Gap In A State's Public Policy Over Gaming Which Requires Reform

A. California Prohibits Most Forms of Gaming

California is a non-casino State. The State Constitution bars the State Legislature from authorizing, and requires it to prohibit, "casinos of the type currently operating in Nevada and New Jersey." (Cal. Const., Article IV, section 19(e).) California's penal code prohibits, among other things, roulette, twenty-one, any banking

or percentage game played with cards or dice, and slot machines. (See Cal. Penal Code sections 330, 330.1, 330a, 330b.)

California only permits the following types of gaming: horse racing, bingo games for charitable purposes, a State lottery (while prohibiting the sale of lottery tickets by anyone else in the State), and non-banked card games.

B. IGRA Has Expanded The Nature of Gaming Operations Permitted In The State

IGRA, however, expands the nature of the gaming operations permitted in a State and can therefore create a significant gap in a State's public policy against gaming.

IGRA establishes three classes of gaming, which are subject to varying degrees of tribal, state and federal regulation. Class I gaming is limited to social games with prizes of minimal value or traditional tribal ceremonial games and is within the jurisdiction of the tribe itself. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming includes bingo and non-banked card games that are explicitly authorized by state law or not explicitly prohibited by state law and is subject to federal oversight by the National Indian Gaming Commission. 25 U.S.C. §§ 2703(7), 2710(b). Class III gaming activities – which are at issue here – constitute "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). However, a tribe is entitled to engage in class III gaming only if such activities are (1) authorized by a tribal ordinance or resolution, (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity," and (3) conducted in conformance with a tribal-state compact entered into between the tribe and the state. 25 U.S.C. § 2710(d)(1).

However, the requirement that the gaming activity be limited to such gaming that the state permits "for any purpose by any person" has been construed to allow a tribe to engage in a form of gaming operation not available elsewhere in the state. Accordingly, although California has no gaming facilities, IGRA permits tribes to establish gaming facilities as long as the type of games offered therein comport with California law. In other words, California's authorization of a State Lottery that offers a single vending machine terminal in a grocery store triggers the right under IGRA for a tribe to negotiate a gaming facility full of lottery devices. Likewise, as the Commission knows from the testimony of the Connecticut Attorney General, although Connecticut only allows charities to conduct "Las Vegas Nights," IGRA allows tribes to operate casinos every day and night.

Specifically, in *Mashantucket Pequot Tribe vs. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990), although Connecticut law only permitted certain non-profit organizations to offer games of chance at "Las Vegas Nights," the Second Circuit Court of Appeals ruled that the Mashantucket Pequot Tribe was entitled to negotiate with the State over the operation of a full-time casino which would offer those games. In that case, the State of Connecticut argued that its limited authorization of the conduct of "Las Vegas Nights" by non-profit organizations did not amount to a general authorization of such casino-style gaming and that such activity was contrary to the State's public policy. Nonetheless, the Second Circuit ruled that since Connecticut permits games of chance, "such gaming is not totally repugnant to the State's public policy" and thus the State had to negotiate with the Tribe concerning the establishment of a casino at the reservation. *Id.* at 1031, 1032.

Although the Ninth Circuit has disagreed with Second Circuit's reasoning in *Mashantucket Pequot Tribe*, the Court has stated that the Second Circuit reached the correct result since "IGRA's text plainly requires a state to negotiate with a tribe for a gaming activity in which the state allows others to engage" and "[b]ecause Connecticut allowed charities to operate games of chance, it had to negotiate with the tribes over these games." *Rumsey Indian Rancheria of Wintun Indians vs. Wilson*, 64 F.3d 1250, 1259 n.5 (9th Cir. 1994), *cert. denied sub nom, Sycuan Band of Mission Indians v. Wilson*, 117 S.Ct. 2508 (1997).

In *Rumsey*, the Ninth Circuit did place limits on the type of games a tribe could operate, ruling that "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Id.* at 1258. *Accord*, *Cheyenne River Sioux vs. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (the Eighth Circuit agreed with the State that it need not negotiate with the Tribe to permit it to offer traditional keno if only video keno was permitted in the State).

Nonetheless, *Rumsey* permits tribes in California not only to offer lottery games – since the State Lottery (but only the State Lottery) is permitted to offer them – but to offer them in a manner not heretofore permitted in the State: gaming facilities full of lottery games – even though the State Lottery operates no such facilities, and no such facility legally exists anywhere else in the State. Thus, as a result of IGRA, California must negotiate over the establishment of gaming facilities simply because the voters approved the establishment of a State Lottery which offers a single vending machine in a grocery or convenience store. And with some 100 tribes, California could be filled with such gaming facilities despite its non-casino status.

This is a significant encroachment on a State's public policy, which the State has sought to address through the negotiation of a limit on the number of lottery machines the tribes can operate, as set forth in Part IV of my testimony.

C. IGRA Needs To Be Reformed

Thus, IGRA allows tribes to engage in a form of gaming operation that can be incongruent with a state's public policy over gaming. As long as states are entitled to formulate their gaming policies, IGRA should be reformed so that tribal gaming is consistent with them. That is not to say that the tribes don't have sovereignty to establish enterprises on their reservations. They do, but they are subject to federal law, which recognizes that gaming has externalities, including economic and social consequences which go beyond the boundaries of the gaming establishment. That should require that the people in the affected area determine their jurisdiction's policy toward gaming and provide for the regulation of that activity.

However, addressing the scope and manner of gaming under IGRA is not enough. Other provisions of IGRA also require reform.

IGRA places the state at an unfair advantage in negotiating the scope and regulation of the gaming activities to be operated by a tribe. Under IGRA, a state must negotiate a compact in good faith, 25 U.S.C. § 2710(d)(3)(A), whereas the tribe has no obligation to negotiate in good faith. That means that a tribe can refuse to make any concessions or to accommodate a state's sovereign interests without violating any of the provisions of IGRA. Yes, the tribe bears the risk of not reaching a compact if it is inflexible, but IGRA granted it the right to sue the state for failing to negotiate in good

faith. And the focus of that case is only on the state's conduct in the negotiations, not the tribe's.

Admittedly, the U.S. Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), ruled that Congress could not abrogate the states' Eleventh Amendment immunity from suit under IGRA, thus permitting the states to assert their immunity from suits brought by the tribes charging bad faith. But California has not recently been asserting its Eleventh Amendment immunity from suit, and the Ninth Circuit has ruled that where a state bars a bad-faith suit by invoking its immunity, the United States may not be entitled to enjoin the tribe from engaging in uncompact gaming. *See United States v. The Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998). While the tribes certainly should have some type of a remedy if a state fails to negotiate in good faith, that remedy should comport with a state's public policy and the tribes should also have an obligation to negotiate in good faith.

Finally, IGRA does not grant a state the authority to bring an enforcement action to enjoin a tribe from engaging in class III gaming without a compact. This is a serious failing, which has left California powerless to enjoin the establishment of illegal casinos in the State.

### III. The Circumstances Surrounding The Violation of IGRA in California.

Although various tribes have contended that they began operating uncompact gaming in violation of IGRA because the State refused to negotiate with them (presumably on the basis of the theory that "two wrongs make a right"), nothing could be further from the truth. California began negotiating with various tribes over tribal-state compacts intended to authorize class III gaming in 1991 and 1992 (and had already

negotiated several off-track betting compacts). The State held joint negotiations with some 16 Tribes and separate negotiations with other tribes.

However, the State and the tribes disagreed as to the State's obligation to negotiate over that which was prohibited under State law, including electronic gaming devices that constituted slot machines(which are prohibited under Penal Code Section 330b) and live percentage card games. (See *Rumsey Indian Rancheria vs. Wilson, supra*, 64 F.3d at 1255.) The tribes argued that the State was obligated to negotiate over slot machines because in their view they were "functionally similar" to the video lottery terminals operating in the State. *Id.* at 1256.

Accordingly, the tribes and the State agreed to submit their dispute to federal court. They concluded an agreement wherein the tribes agreed to file a complaint for a declaratory judgment, requesting the court to determine the rights and obligations under IGRA to negotiate over specific games, including the electronic gaming devices. The agreement provided that in the event of an adverse judgment by the district court, the State would be under no obligation to conclude a compact with any of the tribes "unless the Tribes agreed to exclude from said negotiated compact any gaming activity the State has appealed, pending the outcome of said appeal."

Unfortunately, in 1993, after the district court ruled that the State Lottery's on-line terminals were sufficiently similar to the tribes' proposed video gaming devices to require the State to negotiate over them, the tribes did not wait for the State's appeal to be concluded, but began to operate the disputed video gaming devices without a compact. This was a clear violation of the agreement with the State – and of IGRA.

Moreover, on appeal, the Ninth Circuit reversed the district court and ruled that "IGRA does not require a state to negotiate over one form of class III gaming activity simply because it has legalized another, albeit similar form of gaming." *Rumsey Rancheria vs. Wilson, supra*, 64 F.3d at 1258. However, by then, certain tribes in the State had commenced casino operations using the disputed slot machines, and more tribes followed.

Only around February, 1994 – some two years after the commencement of the negotiations – did the State terminate the joint negotiations with the tribes in light of the fact that the tribes had unilaterally decided to conduct slot machine operations without a compact and without awaiting the outcome of the *Rumsey* litigation. Ultimately, some 39 tribes established illegal casinos.

By doing so, the tribes had upset the balance established by IGRA. Whereas IGRA provides that "Class III Gaming activities shall be lawful on Indian lands only if such activities are ... conducted in conformance with a Tribal-State compact ...," 25 U.S.C. § 2710(d)(1)(C), tribes were engaging in class III gaming first and then considering whether to enter into a compact negotiated with the State. However, as long as the tribes could engage in unlawful gaming until such time that they concluded a compact, they would never have an incentive to conclude a compact acceptable to the State. After all, they were engaged in the unlawful (and lucrative) gaming that they desired, and a compact limited them to legally permissible gaming subject to some State regulation. The United States has now brought enforcement actions against the tribes engaged in uncompact gaming which refuse to enter into a compact acceptable to the State. But many tribes are resisting.

IV. The State's Efforts to Accommodate Tribal Interests While Seeking to Respect The State's Public Policy Concerning Gaming

The State, however, has sought to reconcile tribal sovereign interests with the State's own sovereign interests in maintaining its public policy over gaming.

A. The Pala Compact

On August 31, 1996, a non-gaming tribe – the Pala Band of Mission Indians – requested negotiation of a tribal-state compact, and the Governor began to negotiate a comprehensive compact over a 17-month period. The Pala Band retained five attorneys who also represented a significant number of the gaming tribes in the State. Thus, although the State would not officially negotiate with tribes violating IGRA, the interests of California gaming tribes were represented through their attorneys at the negotiating table. (Later in the negotiations, two of the five attorneys voluntarily dropped out.)

On March 6, 1998, the State and the Pala Band signed a compact, and on April 25, 1998, the Department of the Interior approved the compact. The compact bridges the gap between the State and tribes which agree to enter into it or a compact based on it:

- It allows the Tribe to engage in any legally permissible gaming under the State Lottery Act – whether or not the State Lottery is operating such a game.
- However, since Pala sought to open up a gaming facility full of lottery devices – unlike the State Lottery and unlike any other facility in California – the State took the following steps:

(1) It limited Pala to 199 lottery devices, with the right to license lottery devices from other tribes up to a total of 975. This had the dual advantage of discouraging the proliferation of gaming facilities, while at the same

time benefiting non-gaming tribes: Non-gaming tribes could profit from licensing their allocation of lottery devices while giving up their right to establish their own gaming facility.

(2) The compact also sought to avoid New Jersey-style casinos in violation of the State Constitution by prohibiting class III gaming in any hotel.

(New Jersey law has defined casino as rooms in a casino hotel facility approved for the conduct of casino gaming.)

(3) The compact also sought to avoid Nevada-style casinos in violation of the State Constitution, by, *inter alia*, requiring that card games be offered in a different area from the class III gaming devices unlike many Nevada casinos.

- The Compact also extended protections to members of the California public who lived near, worked at, or patronized the gaming facility through the following means:

(1) For the first time, local communities were given a significant voice in the negotiation of provisions of a compact over local issues. Before a tribe could commence or continue its lottery operations, it had to enter into an agreement with the local government addressing various local issues, including compensation for local police and mitigation of any significant effects on the environment outside the tribe's reservation caused by the tribe's class III gaming.

(2) Patrons will be protected against injury and property damage through insurance in the amount of five million dollars per occurrence. The Tribe has agreed not to invoke its sovereign immunity up to the limits of the policy since without such a waiver, no claims could be brought under the insurance policy.

(3) A patron has the right to require binding arbitration of a dispute over winnings from a game if dissatisfied with the resolution of the dispute by the Tribe's gaming agency.

(4) Employees at tribal gaming facilities will receive various State-law protections and benefits that other State employees receive: workers' compensation, unemployment insurance, disability benefits, and wage and hour law protections. Service employees assisting with the Tribe's gaming operations will be granted the same right to self-organization that off-reservation employees have, although the employee organization must agree to a "no strike" clause and labor arbitration of disputes before it gains access to the reservation or is granted the right to recognition or the right to negotiate over wages, hours, and conditions of employment.

The State has now concluded separate and different compacts with seven other tribes based on the same principles, although the provisions vary in each compact.

**B. Response to the Pala Compact By Various Gaming Tribes**

Regrettably, certain tribes engaged in uncompact class III gaming objected to the Pala Compact on a variety of grounds.

They have claimed that various provisions infringed on their sovereignty – although a tribe's sovereignty, like the State's, is subject to federal law. And federal law prohibits a tribe from offering class III gaming unless it reaches an agreement with the State on the level of State regulation of the gaming.<sup>1</sup>

The tribes also disagreed with the limits placed on the number of lottery devices which they could operate. However, other States have imposed limits. *E.g.*, South Dakota's compact with the Flandreau Santee Sioux Tribe.<sup>2</sup> Moreover, in light of the approximately 100 federally recognized tribes in the State, some limitation was necessary to discourage California's transformation into a State with 50-100 gaming facilities.

C. The Governor's Offer To The Gaming Tribes

In conjunction with a decision by the United States to bring enforcement actions against uncompact gaming operations using slot machines illegal under State law, the Governor offered tribes engaged in unlawful gaming the option of ceasing their illegal gaming and negotiating their own compact, or entering into a compact based on the Pala compact with a generous transition period during which they could bring their operations into conformity with the terms of the compact.

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<sup>1</sup> Indeed, the Senate Report for IGRA noted that the compact process was to be "a viable mechanism" for settling the State's position that State laws and regulations relating to class III gaming should be respected on Indian lands, and the tribes opposition thereto, by requiring that the tribes reach agreement with the States on the level of regulation before they can commence their class III gaming. *See* Senate Report at 13, U.S. Code Cong. & Admin. News 1988, 3083.

<sup>2</sup> *See Cheyenne River Sioux Tribe vs. State of South Dakota*, 3 F.3d at 276 n.4.

As a result of the Governor's offer, ten tribes – or approximately 25% of the tribes engaged in uncompact gaming – agreed to enter into a compact based on the Pala Compact. Thereafter, the Governor's Office entered into negotiations with those tribes, offering to negotiate the transition period and to clarify and simplify provisions in the Pala Compact. Among other things, the Governor's Office allowed tribes which entered into a compact to terminate it if the ballot initiative, which the Tribes have qualified for the November ballot, passes and is upheld as constitutional.

D. The Efforts Of Tribes To Bar Other Tribes From Bringing Themselves Into Compliance With the Law

Incredibly, certain tribes engaged in unlawful gaming, spearheaded by the "California Nations Indian Gaming Association," have sought to block any tribes which wish to comply with IGRA from doing so through the following actions:

- Various tribes have lobbied to block legislation sponsored by the Governor to ratify compacts with other tribes, thereby seeking to deprive those tribes of their sovereign right to enter into a compact with the State. The legislation is still pending before the State Legislature.
- While blocking legislative ratification of the compacts, counsel for certain tribes brought an action in the Superior Court in Sacramento to enjoin the Governor from enforcing or implementing any tribal-state compacts without legislative authorization. The Superior Court ruled that while the Governor had the authority to negotiate, he could not bind the State without prior legislative authorization or subsequent legislative ratification. Since the Governor had sought legislative ratification of tribal-state compacts from the

first signing, this ruling has not affected the Governor's policy, but it does jeopardize the right of tribes who want to enter compacts to legally operate gaming pursuant to those compacts if the legislature does not ratify the compacts and the court's ruling is not reversed.

V. Conclusion

No society that is based on the rule of law can tolerate a situation where the law is deliberately violated by a group of parties, particularly where the violations run afoul of an important State public policy. That, unfortunately, is the situation in California where tribal casinos offer slot machines that are illegal under State law and are not subject to any State regulation – despite the clear requirement in IGRA that a compact be entered to govern the gaming operations before a tribe may engage in class III gaming.

The U.S. has brought forfeiture actions against the uncompact machines, but as long as these casinos can operate, they make it difficult for the tribes which want to play by the rules to compete. In other words, the unlawful gaming can crowd out the legal gaming.

Even assuming that IGRA can be effectively enforced, this Commission should carefully examine the effect of IGRA on a State's gaming policies. To better reconcile IGRA with State policies related to gaming, the following modifications are necessary:

- 1) The scope of gaming permitted to a Tribe under IGRA needs to be better conformed with a State's overall policy.
- 2) If tribes and the State are to reach agreement as sovereigns concerning the regulation of the tribes' gaming, the tribes as well as the State must have an

obligation to negotiate in good faith. And the burden of proof should be on the party claiming that the other party has acted in bad faith.

3) A State should be granted the authority to enjoin class III gaming conducted without a compact.

4) The tribes are entitled to a remedy with respect to those States which fail to negotiate in good faith, but that remedy must not permit a type or manner of gaming that does not comport with State policy and must conform to the State's sovereign interests in the treatment of its residents as patrons, employees, or neighbors of the tribal gaming operations.

Tribes are entitled to participate in the "American Dream." We must all seek to improve the economic conditions of their members. But gaming, unlike other industries, has economic and social consequences that go well beyond a tribe's reservation. What the Commission must do is to propose a legal arrangement that better respects public policy over gaming.