



**Testimony**  
**Of**  
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**Before The**  
**National Gambling Impact Study Commission**  
**Tempe, Arizona**  
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The National Indian Gaming Association (NIGA) is a non-profit organization established in 1985 by Indian Nations engaged in governmental gaming. NIGA membership is composed of 159 sovereign Indian Nations and 99 non-voting Associate (Corporate) members representing tribes, organizations and businesses engaged in Tribal gaming enterprises throughout the United States. NIGA was formed by Tribes to protect their sovereign governmental rights and to support their gaming and economic interests in Congress and elsewhere.

My name is Jacob Coin. I am the Executive Director of NIGA. I want to thank you for inviting NIGA to testify before the National Gambling Impact Study Commission today. I also want to thank this Commission for the positive response NIGA has had in terms of inquiry and instruction from the Commissioners and staff of this Commission.

NIGA was significantly involved in the formation of this Commission. At that time, Indian Nations determined they would not oppose the creation of this Commission. Indian governmental gaming has been the object of study and scrutiny, both fair and unfair, as long as it has existed. Indian Nations have nothing to hide. Our gaming, and the safe and secure regulation of our gaming, has been a consistent subject of public record.

We do not claim we are without a few problem areas. However, Indian Nations are true believers in safe and secure regulatory systems. For many Indian Nation governments that

offer it, gaming has been just the beginning of a wide range of economic growth. Only gaming, for 225 years of United States history, has provided this level of growth and, along with it, the opportunity to help ourselves out of poverty. Indian Nations will not sacrifice opportunity and the future of our children for a few dollars today.

We encourage this Commission to do a thorough job on Indian gaming. We challenge the members of this Commission to visit places like Pine Ridge, South Dakota, where, even with gaming, the real unemployment level is around 75%. There is simply more economic work to be done in this, and at most other Indian Nations, for gaming to be viewed as a complete solution. It is unconscionable that such a situation is permitted to exist in the United States. Many Indian Nation leaders have commented, "I would rather have a factory than a casino, any day." But, Indian lands are most often distant from population and economic centers and Indian Nations are often left with no other economic alternative.

We challenge this Commission to tell the real story about the improvement Indian gaming has brought to places like the Oneida Nation, which built and supports a new K-12 school with their gaming dollars. Or, the general support by Indian gaming of the Indian Tribal College system with tuition and employment dollars.

We challenge this Commission to look beyond the shortsighted view of some who hold that gaming is simply immoral. Poverty is immoral. Hunger is immoral. Joblessness is

immoral. Disease is immoral. Gaming is a means for Indian Nations to end the immoralities heaped upon them throughout 225 years of history.

We challenge this Commission to tell the truth about regulation of Indian gaming. Indian governmental gaming is the most regulated gaming in the United States, if not the World. Indian Nations spend in excess of \$100 million on regulation to oversee about 170 Class III or casino-style facilities. Nevada spends \$30 million to oversee thousands of facilities. Indian governmental gaming is regulated at three jurisdictional levels, the Federal Government, the Indian Nation government, and the state government, through compact provisions. The Federal Government established the National Indian Gaming Commission for the specific purpose of regulating Indian gaming. However, the list of other Federal departments charged with aspects of Indian gaming regulation include the Department of the Interior, the Bureau of Indian Affairs, the Environmental Protection Agency, the Department of Justice, the Department of the Treasury, the Financial Crimes Network, the Internal Revenue Service, and the Secret Service.

Finally, we challenge this Commission to tell the truth about the illegal situation that exists today. Indian Nations are being held hostage by states that refuse to obey Federal law and negotiate in good faith with Indian Nations.

With that introduction, we will respond to the questions that the Commission has posed.

1) *How well does IGFA work? What are the problems or oversights associated with the Act and the Compacting process it requires?*

Some might answer that IGRA works well enough that more than 150 Tribal-state Compact agreements have been reached and signed in 26 states. Only a handful of states, Texas, Oklahoma, Florida, California, Nebraska, Massachusetts and Rhode Island have refused to negotiate in good faith, in violation of the Federal IGRA law.

NIGA believes this is evidence that IGRA is functional, but not entirely workable. IGRA still provides for impermissible limitations on Indian Nations favoring states in negotiations. States refuse to negotiate in good faith and many Indian Nations, seeking any immediate means to end the suffering of their citizens, are forced to comply. Can a hungry man bargain fairly, or equally, for food? Some states appear not to care that negotiations are conducted under duress. States have never provided adequate assistance to Indian Nations or to their Indian citizens. Placing Indian Nation economic development under authority of certain states not inclined to assist Indian Nations to improve, is not in the best interest of Indian Nations and is tantamount to a charge of neglect by the United States, a legal trustee.

For example, in Texas. Governor George Bush Jr. has thus far refused to sign a compact with the tiny Kickapoo Indian Nation. The Nation owns only a few thousand acres and is dirt poor, with little other alternative to improve their lot with new opportunities.

In South Dakota, the Rosebud Sioux Tribe, with more than 20,000 members and thousands of square miles of land, is only permitted 250 machines by the state. The state is concerned Indian gaming would be competition for its thousands of taxable lottery machines and refuses to permit expansion. The Rosebud Sioux Tribe was recently identified by USA Today as having the highest unemployment rate in the United States, more than 75% measurable.

In Arizona, despite winning a statewide ballot initiative, the Salt River Pima Maricopa Tribe has been unable to get a signed compact from the state. Nuisance litigation has recently been completed and there is now a possibility that the will of the people in Arizona will actually be followed.

In New Mexico, Indian Nations were forced into signing a compact that requires a payment of 16% of the gross revenue to the state. IGRA specifically states that no such payments can be required. The result is that the state is getting fat off of Indian gaming revenue and the Indian Nations still suffer.

Unfortunately, this list goes on and on. IGRA works to a certain degree, but it is not perfect.

There are several problems with IGRA. The first and greatest problem is that provision which requires a Tribe /state compact. This provision was included in IGRA due to state concerns over adequate regulation of Indian gaming. This provision was never meant to

provide any state with the ability to veto Indian gaming. This is clear in the Act. Yet, many states use their simple regulatory check as a hammer to extort money and other concessions from Indian Nations. IGRA took great care to provide protection for Indian Nations against organized crime. IGRA did not provide the same level of care to guard Indian Nations from the same sort of thievery by organized states. The compact provision should be written more precisely to explicitly provide states the role they wanted, a regulatory role.

A second problem with IGRA is the Section 20 sign-off provision for Governors on land into trust acquisitions for gaming purposes. The compacting provision already provides adequate safeguards for the state during the development of Class III gaming on Indian lands. This Section invites lengthy litigation. Requiring the Governors approval on land acquisitions means there are two approval processes, one for the land acquisition and one for the compact. Governors have no right to "approve" Indian Nation land acquisitions and receive a right to tacit inquiry into every Indian land acquisition. Indian Nations have not and do not claim assert any similar right over state acquisitions of Indian lands. This matter is best handled entirely under the compact approval process, with a single state sign-off necessary.

A third problem exists with unclear state authority to sign compacts, and Section 20 acquisitions. May the Governor sign on his/her own authority or must the legislature also authorize the compact? This issue has been litigated several times and differs by state. A simple procedure, state agreement, is intensely complicated. This causes bad feelings

between states and Tribes, and among state representatives. This provision should have been drafted more precisely.

Other problems may exist with the Act, such as the adequacy of the regulatory structure. Although Indian Nations do not feel this is absolutely necessary, Indian Nations have supported an improvement and tightening of the IGRA regulatory framework, such as increasing the amount of funding for the Commission, adjusting the authority for licensing requirements so the Federal government can complete or approve them in a timely fashion, and increasing the authority of the Indian Gaming Commission to oversee Indian gaming more thoroughly and efficiently. Indian Nations believe these changes will improve Indian gaming and do not object to them. Many of these changes are contained in two bills before Congress, S. 1077, authored by Senator McCain and S. 1870, authored by Senator Campbell.

2) *Should the compacting provisions of IGRA be amended? If so, how?*

If states followed the good faith negotiation requirement of IGRA, as required by the law, the delicate balance of the compacting provision would remain sufficient, even after *Seminole*. However, some states see *Seminole* as an excuse to ignore, and violate, the law.

IGRA has lost its balance between Tribes and states and should be fixed. Amendment is one way this can be accomplished.

The Secretary of the Interior, in proposed procedures, Senator McCain (S. 1077) and Senator Campbell (S. 1870) have proposed ways in which Tribes can begin economic development. Generally, these ways follow the same type of process;

- A means is established to determine that negotiations have stalled, usually with evidence that a state has raised the immunity defense.
- The Indian Nation must notify the Secretary, and the state, that they seek procedures.
- The Secretary offers the state the opportunity to join mediation
- ***If the state agrees to participate in mediation***, the matter proceeds to negotiation.
- A mediator is selected.
- The state and Indian Nation submit their proposals to the mediator.
- After negotiation and submission of a final compact offer by each side, the mediator makes a recommendation to the Secretary.
- The Secretary publishes Procedures for Class III gaming based on the recommendation of the mediator.

Or,

- ***If the state does not agree to participate in negotiations***, proposed procedures are submitted by the Indian Nation to the Secretary. (states may opt not to participate in (to avoid another *Seminole* problem.)
- The Secretary examines state law and determines if the proposed procedures comply with state scope of gaming requirements.
- The state is invited to comment on the Tribes proposed procedures and the Secretary's determination on scope of gaming.
- The Secretary publishes Procedures for Class III gaming

3) *Are state and Tribal interests fairly balanced in the compacting process required in IGRA?*

No. As mentioned above, the compacting process as written in IGRA leans too heavily in favor of the state in negotiations. States have often shown more interest in finding a means to collect Tribal revenue than in adequate regulation.

The reason state were permitted in the compacting process was only to participate in regulation of gaming. This state participation was a very large intrusion into Indian Nation self-government rights. Congress, however, felt it was necessary to pacify states that illegal activity was not taking place in Indian gaming.

Many states have used this regulatory foothold to exercise veto authority over the rights of Indian Nations and the development of Tribal economies. This is neither fair nor just.

The law is imperfectly drafted. Many Courts are considering different aspects of the law and the Supreme Court may eventually reach a conclusion. Until this time, or until amendment occurs, or until an Administration fix is permitted, Indian Nations suffer the consequences of this law.

4) *How do disagreements over scope of gaming allowed by Indian Tribes contribute to the breakdown of compact negotiations between tribal and state governments?*

First things first, Tribes and states disagree on scope of gaming “proposed” by Indian Tribes, not “allowed” by Indian tribes.

When states try to limit Indian Nations to a smaller number of games, which states, on the other hand, are already permitting, there will be disagreement. When states do not acknowledge that technology can improve games, but not change the game, there will be disagreement. These disagreements lead to a breakdown in negotiations.

Indian Nations are willing to present these issues to a Court to be resolved, as provided for in IGRA. Indian Nations are willing to follow the law. States, however, have consistently raised an Eleventh amendment defense and these issues do not get resolved. States know they will lose these decisions because they have an unrealistic view of scope of gaming, which is contrary to the law. States refuse to let these issues become resolved in Court as planned under, IGRA. This is not a problem caused by Indian Nations.

The scope of gaming issue is settled. *Cabazon* was clear on scope of gaming permitted, any gaming activity which occurs in a state, under state law or public policy, can be offered by an Indian Nation in that state. IGRA plainly intended to codify the *Cabazon* standard.

Some states have sought to narrow this standard. They claim only the exact games permitted by a state need be offered to a Tribe. They claim this is the new *Rumsey* standard. This, however, is not the legal or IGRA standard.

There are several significant reasons *Rumsey* can not be the scope of gaming standard. The Supreme Court did not decide *Rumsey* and, in fact, refused to hear *Rumsey*. In *Seminole*, the Supreme Court spoke of *Cabazon* as good law. *Rumsey* is still being considered by the lower Court and is not yet final law. The *Rumsey* standard, whatever it eventually turns out to be, will still only be controlling law in that jurisdiction.

5) *What is your view of the IGRA remedy for Tribes if their negotiations with state break down?*

Post-*Seminole*, there is no obvious remedy. Several Courts agree that IGRA did not intend for states to have veto authority over Indian gaming. However, post-*Seminole*, the path to ensuring or asserting Indian Nations legal rights is not clear.

The Secretary of Interior has proposed procedures for cases where states raise a *Seminole*-like Eleventh Amendment defense to suit. The Secretarial Procedures, however, include a strict, over-burdensome and unnecessary level of state-involvement. Indian Nations agree the Secretary has this authority. The Secretary also agrees. The Procedures are proceeding through a regulatory process.

Indian Nations have approached the Department of Justice requesting that, as a legal trustee of Indian Nations, the Department take a case in the name of a Tribe and sue a state for failing to comply with the IGRA. The Justice Department has thus far failed to act on this request. There is some sign that Justice is interested. However, nothing has happened yet. Indian Nations are severely disappointed in the Department of Justice. Some states are clearly in violation of the IGRA good faith negotiation standard. This is a violation of Federal law. We do not understand why Justice turns its head at this unlawful behavior.

Conversely, Indian Nations who are marginally out of compliance with provisions of IGRA have drawn the attention of the Department of Justice and are facing civil action in Federal Courts. *How is it fair to sue Indians and not sue non-Indians (States) for violations of the same statute, IGRA? We question the basis for this determination on the part of the Department of Justice and strongly urge this Commission to examine the issues related to this determination and to put the question of selective prosecution before the Department of Justice.*

Indian Nations in California are seeking a ballot initiative before all the people of the state to require the legislature and/or Governor to agree to a compact. However, as witnessed in Arizona with the Salt River Pima Maricopa Tribe, even winning a statewide ballot initiative by the majority of the people in a state does not guarantee a compact will be signed.

There is no clear path to a compact for many Indian Nations. These Indian Nations continue to suffer poverty and despair more often associated with Third World Countries.

This Commission was created to advise Congress on gaming issues. We strongly urge this Commission to support a fix for the problems created by the *Seminole* decision. This area cries out for examination and discussion by this Commission.

6) *What is your view of the subsequent Seminole decision foreclosing that remedy?*

*Seminole* was a case concerning Indian Nations that, ultimately, had little to do with Indian Nations. The case dealt with the tension between Federal authority and state authority. Although the subject of the case was the IGRA statute, the decision was entirely based on Federalism. The holding of the Court is that the Federal government has limited authority to force a state into Federal Court without the agreement of that state, and that the Federal government could not do so in IGRA.

The effect of the case on IGRA, however, remains unclear. How much of IGRA does *Seminole* make unconstitutional? Some have suggested that the compacting provision is so important to the delicate balance of the Act that the entire Act fails if the compacting balance is altered.

Many others point to the severance provision in IGRA and assert that the Secretary, under the Act, is now obligated to "make the Act whole" by creating a bridge to ensure the Congressional intent that compacts be completed. A Court would likely view this determination favorably. A decision of the Court that negotiations are stalled is the only part of IGRA *Seminole* prevents. Any reasonable person can determine this in most, if not all, cases without a Court decision. The Secretary could just as easily make this determination without concern of making a mistake. Most stalled negotiations have been that way for years.

What is clear is that IGRA does not intend to provide states with veto authority over Indian Nations that seek to offer gaming. A remedy is vital to the Act

7) *In light of Seminole, what is an acceptable alternative procedure so that state's interests are respected and Tribes have a remedy if states do not negotiate in good faith?*

As mentioned above, if a state would merely follow the process it created in IGRA the Court or a mediator would guard and protect a state's interests. The problem which arises is that states are not concerned with having their interests protected. They are only interested in dictating terms to the Indian Nation. A Court or mediator might decide 60% or 70% in the state's favor. But this isn't good enough. By raising the immunity defense and refusing to take part in the process, the state has the opportunity to dictate all the terms.

In 1993, Indian Nations and state Attorneys General sat down and attempted to reach a compromise on amendments to IGRA which would have resolved all these problems. Most issues were resolved when the Governors walked away from the negotiations. They didn't want a resolution to these problems. An unsure situation in Indian gaming works in the favor of Governors who do not want to negotiate.

Senator McCain has proposed remedies to Seminole during the last two Congress. In last Congress, Senator Inouye and in this Congress, Senator Campbell have offered remedies. States have never supported any of this legislation.

The Secretary of the Interior has proposed compact procedures for cases where a state and Tribes are unable to reach an agreement. Unfortunately, the Secretary's procedures include substantial state involvement. Indian Nations believe the Secretary's Procedures give states too much authority. However, the National Governors Association recently wrote to the Senate supporting legislation that would prohibit the Secretary from completing these procedures.

It is not a coincidence that every opportunity for a remedy has been opposed by states. Do not be fooled. States want no such remedy; unless, the remedy involves dictating terms to Indian Nations.

Indian Nations believe there should be a reasonable procedure, which guards state's rights under the law and provides Indian Nations a remedy. Indian Nations have always been

willing to sit down and negotiate issues with states. (We didn't leave the table in 1993.)

We are not convinced states feel the same way.

8) *What is the status of negotiations between Tribal and state representatives, and the Department of the Interior for acceptable alternative procedures?*

Indian Nations are encouraged that the Attorneys General and Governors are willing to come back to the table. This status of constant litigation helps no one, except maybe the Attorneys.

There has been only one pre-meeting and no negotiations yet. We expect this will be a diligent process.

The general agreement is that neither side will negotiate in the press, or release information. There is not much more to say, except we are encouraged and hopeful.

Indian Nations will be at the table. We are always willing to talk. We sincerely hope the Attorneys General and Governors feel the same.

In conclusion, thank you for inviting me to testify today. I am willing to respond to any questions. Or, I will be happy to respond in writing to any questions that you might have on a later date after you more thoroughly review my materials.

I can be contacted at NIGA, (202) 546-7711, (202) 546-1755 (fax).