

STATEMENT OF THOMAS F. GEDE
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before the
NATIONAL GAMBLING IMPACT STUDY COMMISSION
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Please let me thank the Commission for this opportunity to make a statement on behalf of California's Attorney General Daniel E. Lungren. With the Commission's permission, I will provide a slightly longer written statement, with attachments, and speak only to the key points. Since 1991, I have been privileged to serve as a policy advisor and staff counsel for Attorney General Lungren and to participate in a number of policy initiatives relating to Indian gaming in California and nationally under the auspices of the National Association of Attorneys General and the Conference of Western Attorneys General. In 1993, I served as one of the state negotiators working with tribal representatives attempting to develop consensus amendments to IGRA for the Senate Indian Affairs Committee. I have also served as counsel of record in several multi-state amicus briefs on Indian gaming in the federal circuit courts and the United States Supreme Court, including the case of *Seminole Tribe of Florida v. Florida*, decided in 1996.

I come to this Commission with two principal messages: first, I believe that the States of the Union have accepted their obligation to negotiate in good faith with Indian tribes under the Indian Gaming Regulatory Act of 1988 (IGRA) and that they have in fact commenced, invited or conducted negotiations in good faith, only to face endless and protracted litigation from tribes over legal questions, differing views of which cannot properly be characterized as issues of good or bad faith. Second, I believe that IGRA can and should be amended to provide incentives to both state and tribal governments to stay at the table and negotiate out their differences, rather than fly out the door to a federal courtroom or to the Secretary of Interior for an administrative remedy whenever there is a difficult question or a difference of opinion at the negotiating table. Let me elaborate as to both points.

In my view, most of the difficulty in the last ten years relating to IGRA has revolved around allegations by tribes that the states have refused to negotiate in good faith for class III games or gaming activities that are otherwise criminally prohibited under state law, and therefore, by IGRA itself. Tribal government lawyers will tell you that the purpose of IGRA, found in its legislative findings and purposes, is to promote tribal economic self-sufficiency, and therefore, tribes should be able to negotiate for

economically-viable forms of gambling, notwithstanding state laws. Congress, however, made clear that it intended to provide for a means to *regulate* Indian gaming, and knowing that the federal government had neither the resources nor the will to oversee tribal class III gaming activities, Congress expected that the tribes and states could rely on some agreed-upon use of state regulatory resources. Of course, Congress understood that a state would only have regulatory resources for those gambling activities it permitted, and certainly it would not have regulatory resources for gambling activities it prohibited. Consequently, Congress provided that tribal class III gaming, in order to be legal, must be the subject of a tribal-state compact for only that gaming that is permitted by the state for any purpose, for any individual, organization or entity. Obviously, if a state permitted lottery gaming, even if only by the state itself, or parimutuel wagering on horse racing, even if only by licensed horse racing entities, the state "permits" that gaming and has regulatory resources for those activities, and thus, it is the proper subject of tribal-state compact negotiations. This state of affairs, apparently, has never been satisfactory for tribes that insist upon the use of video gambling devices, even where such devices are prohibited under state laws. These devices are normally prohibited on Indian lands under the Johnson Act, and can only become legal on Indian lands under IGRA when the tribe and state compact for such devices *in a state where the devices are permitted in the first place*.

The differing views of the tribes and states as to what are "permitted" gaming activities in a state, particularly as it relates to video gambling devices, has resulted in protracted litigation over the past ten years, litigation which continues to this day. Tribal government lawyers have pressed in the lower courts that the Supreme Court's 1987 decision in *California v. Cabazon* recognized a virtually unfettered right of tribes to engage in gambling anywhere, free of state law or regulation. However, Congress obviated the need to engage further in the meaning of *Cabazon*, when it adopted IGRA in 1988 and set forth a statutory basis for tribal gaming. While there is insufficient time here to review the legal merits of these arguments, it should be mentioned that the states have prevailed in court in a number of cases that have held that a state need not negotiate for those *specific* gaming activities that a state prohibits, no matter how similar they are to activities that the state permits. This is the principal opinion adopted in 1996 by an en banc panel of the Ninth Circuit Court of Appeals in *Rumsey Indian Rancheria v. Wilson*. The U.S. Supreme Court declined to review this key decision in June 1997. I have attached to this statement the brief of the United States Solicitor General successfully urging denial of review of *Rumsey*, then entitled *Sycuan v. Wilson*, and setting forth the views of the United States, views which fundamentally adopted the "game-specific" decision of the Ninth Circuit. Under *Rumsey*, then, lottery dispensing devices that are permitted in a state but which are not slot machines do not open the door to negotiate banking-style slot machines. That a state permits parimutuel

wagering on horse racing, but prohibits slot machines, cannot open the door to negotiate slot machines that use a "parimutuel" payout. Non-banking card games permitted in a state do not open the door to banking card games, on a theory that the state permits a particular card game by name or by a particular manner of playing.

It was the flurry of litigation in the 1990's in the federal courts, in cases brought by tribes against states, that ultimately led a number of states to raise the jurisdictional bar of the Eleventh Amendment to suits brought against states in federal court. California was not one of those states, as we tried to resolve our differences in the *Rumsey* case in a so-called friendly lawsuit. I will not dwell on the merits of the *Seminole* decision, but the Commission should know that states raised the Eleventh Amendment, before *Rumsey* was the settled case on the scope of gaming, not out of spite or bad faith. They did so because no other course of conduct was available to them when they were faced with the prospect of endless lawsuits brought by tribes for gaming that those states prohibited and the additional prospect that if a federal court ruled, contrary to what was decided in *Rumsey*, against those states on the scope of gaming question, each such state would be found to be to have negotiated with a lack of good faith, and the matter could be resolved by the Secretary of Interior, who has a trust responsibility for the tribes and no obligation to the states. In May 1996, I had the privilege to testify before the Senate Indian Affairs Committee on the consequences of the *Seminole* decision, and I have attached a copy of that statement for the Commission.

As for IGRA, I believe that the compacting provisions are not defective or faulty in and of themselves. There is no reason why the tribes and states cannot work out their differences at the negotiating table over the scope of gaming under state and federal law and over the myriad of policy concerns both state and tribal governments have, including difficult issues relating to environmental protection, law enforcement, cash transaction reporting, anti-money laundering measures, traffic congestion, labor and employment laws, and similar concerns. However, IGRA instead provides an incentive for litigation over negotiation, and therein lies my recommendation that it be amended, as I shall discuss.

As a consequence of the *Seminole* decision, there is an argument to be made that IGRA no longer provides a remedy for tribes if a state is truly recalcitrant and refuses to negotiate in good faith for gaming it permits in the state. If the state raises the Eleventh Amendment to a federal lawsuit initiated by a tribe, alleging the state is in bad faith, the case may be dismissed and there is no further recourse for the tribe. The state Attorneys General recognize this disparity brought about by the *Seminole* decision, but make two points: first, we are unaware of any state being truly recalcitrant about negotiating for what it permits within its state, and even where a state insists upon its

criminal law prohibitions on slot machines, certainly a state's view of its own criminal law should not be the basis for an assertion of a "bad faith" lawsuit. Of course, most states may consent to suit, and not assert the Eleventh Amendment, in which case the federal-court process in IGRA proceeds unchanged by *Seminole*.

Second, it is up to *Congress* to provide for a remedy, including any remedy that permits the tribe to go to the federal government for gaming procedures. In January this year, the Secretary of Interior proposed a rule allowing him to prescribe, as a matter of regulatory law, class III gaming procedures for a tribe where a federal court has dismissed the tribe's suit against a state on Eleventh Amendment grounds, a so-called "by-pass" provision. It is the unequivocal view of the Attorneys General and the Governors of the States that the proposed rule for procedures has no legal basis as the Secretary has no legal authority to circumvent IGRA. Only a statutory "by-pass" would withstand legal muster. I have attached the June 19, 1998, comments on the proposed rule, signed by twenty-five Attorneys General from States with Indian gaming on the letterhead of Florida Attorney General Robert Butterworth, which comments I helped to prepare. This set of comments exhaustively sets forth our legal views on the Secretary's attempt to usurp regulatory power where the statute does not allow it and provide a by-pass that allows a dispute resolution by a federal official that has a trust responsibility to only one side of the parties in dispute – the tribes. I commend to the Commission these important comments of the state Attorneys General. That said, I believe there is room to consider a *statutory* by-pass amendment to IGRA, but only where it is accompanied by reasonable standards that protect the states from a one-sided resolution in favor of the tribes at the expense of the states and the states' legitimate legal and policy concerns.

In my own view, any statutory "by-pass" to the Secretary of Interior ought to include some key accommodations to the states, including:

- a grant of civil enforcement authority to the states to stop illegal, uncompacted-for gaming activities operating in violation of IGRA;
- a clarification that federal law enforcement authorities have civil enforcement authority to stop illegal, uncompacted-for gaming activities operating in violation of IGRA;

Such authority would provide an incentive for tribal governments to come to the table and negotiate for legal class III gaming activities, rather than "jumping the gun" and resorting to "self-help," when the matter seriously implicates federal criminal law.

- a clarification that the Secretary would be restricted to allowing only those specific games or gaming activities permitted by the state and not those expressly prohibited by the state, no matter how similar they may be to permitted games.

I do not believe that a statutory by-pass to the Secretary need include any provision that the Secretary pass on the good faith or bad faith of the state, such as the federal court is required to do under IGRA whenever a federal lawsuit proceeds with the consent of the state. It is fundamentally offensive to the states to have a federal official pass on the good faith of a state exercising its sovereign discretion, any more than it would be offensive to a tribal government to have another entity pass on its good faith. Nonetheless, it seems to me worthwhile to consider legislative amendments to IGRA that strengthen the incentives for both parties to negotiate and that provide disincentives for the parties to litigate over every difference. These amendments might include:

- an obligation on both parties to negotiate in good faith, not just the states

If a tribe is violating federal law, including IGRA, it does not come to the negotiating table with clean hands, and it makes it exceedingly difficult for the state to negotiate for that which the tribe is already engaging in, or for that which the state cannot negotiate for at all. Insult is added to injury when the state, not the tribe, gets hauled into federal court for lack of "good faith" when the state articulates its own understanding of state criminal law as the basis of its refusal to agree to games or gaming activities prohibited by state law, and thus, by IGRA.

- "good faith" should be defined more specifically to allow legitimate differences of legal and policy views, including readings of the law, social and environmental impacts, law enforcement concerns, and related topics.

Currently, with a one-sided good faith obligation on the states, and little guidance on what constitutes good faith, states are the parties hauled into federal court. My view is that any incentive to keep the parties at the table, and out of court, works better to accomplish the mutual ends of the parties. Even if a true impasse results, it should not be held against two sovereign governments that must work out their differences with mutual respect and consideration.

I would be pleased to answer any questions the Commission may have and I appreciate the opportunity to provide my views today.