

1 CHAIRPERSON JAMES: Mr. Gede?

2 MR. GEDE: Good morning.

3 CHAIRPERSON JAMES: Good morning.

4 MR. GEDE: I come to this Commission this morning
5 with two principal messages. First, I believe that the states of
6 the union have accepted their obligation to negotiate in good
7 faith with the Indian tribes under IGRA and that they have, in
8 fact, commenced invited or negotiated, conducted negotiations in
9 good faith, only to face endless litigation, protracted
10 litigation from tribes over legal questions differing views of
11 which cannot properly be characterized as issues of good or bad
12 faith.

13 Second, I believe that IGRA can and should be amended
14 to provide incentives to both state and tribal governments to
15 stay at the table and negotiate the differences rather than fly
16 out the door to a courtroom or to the Secretary of Interior for
17 an administrative remedy when there is a difficult question or a
18 difference of opinion at the negotiating table. Unfortunately
19 IGRA provides an incentive for litigation over negotiation and
20 I'd like to elaborate as to both points.

21 In my view most of the difficulty in the past 10
22 years relating to IGRA has revolved around allegations by tribes
23 that states have refused to negotiate in good faith for Class III
24 games or gaming activities that are otherwise criminally
25 prohibited under state law and therefore, under IGRA itself. Now
26 tribal government lawyers will tell you that the purpose of IGRA
27 found in its legislative findings and purposes is to promote
28 tribal economic self-sufficiency and therefore, tribes should be

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1 able to negotiate for economically viable forms of gambling,
2 notwithstanding state laws.

3 Congress, however, made clear that it intended to
4 provide for a means to regulate Indian gaming and knowing that
5 the Federal Government had neither the resources nor the will to
6 oversee tribal Class III gaming activities. Congress expected
7 the tribes and the states to rely upon some agreed upon mechanism
8 for the use of state regulatory resources. Of course, Congress
9 understood that a state would only have regulatory resources for
10 those gambling activities it permitted and that clearly would not
11 have regulatory resources for gambling activities that are
12 prohibited.

13 Consequently Congress provided that tribal Class III
14 gaming in order to be legal, must be the subject of a tribal
15 state compact for only that gaming that is permitted by the
16 state. That state of affairs apparently had never been
17 satisfactory for the tribes that had insisted upon the use of
18 video gambling devices even where such devices are prohibited
19 under state law. These devices are normally prohibited on Indian
20 lands under the Johnson Act, under federal law and can only
21 become legal on Indian lands under IGRA when the tribe and the
22 state compact for such devices in a state where the devices are
23 permitted in the first place. That's the nature of the Johnson
24 Act and IGRA in operation together.

25 This Commission heard, yesterday, I believe from Dan
26 Kolkey, Governor Wilson's legal affairs secretary, who I believe
27 helped the Commission with the question of the scope of gaming
28 and suffice it to say that the states have ultimately prevailed

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1 in cases such as the Rumsey case in clarifying what the scope of
2 gaming is in the Indian Gaming Regulatory Act. Congress set
3 forth a statutory standard. And while you will hear discussion
4 of Cabazon v. California recognize that allegations or assertions
5 that Cabazon somehow gives the tribes an unfettered right to
6 gamble on Indian lands is not what Cabazon said.

7 And, in fact, when it comes to video gambling
8 devices, the Johnson Act is a statute, a federal statute that
9 prohibits the use of the gambling devices in the state in the
10 Indian lands in the first place unless under IGRA a tribal
11 compact allows for the use of those devices in a state that
12 permits them in the first place. So if a state prohibits them in
13 the first place, the Johnson Act cannot be overcome.

14 Also it was clear as a result of the Rumsey case that
15 a state need not negotiate for those specific gambling activities
16 that the state prohibits, no matter how similar they may be to
17 the proposed activities by the tribe. If the state criminally
18 prohibits them, they're off the table. Let me just briefly
19 address the Seminole case. I was counsel of record in the
20 Supreme Court for 31 amicus states that came in on that case.

21 The states did not raise the 11th Amendment as a
22 jurisdictional bar to the litigation brought by the tribes out of
23 spite or bad faith or sometimes alleged racism or anti-Indian
24 sentiments. The states raised the 11th Amendment because of a
25 flurry of lawsuits brought against the states for insisting upon
26 an interpretation of what state law meant with respect to video
27 gambling devices in those states and the additional prospect that
28 if -- and this is pre-Rumsey, the federal courts were going to

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1 rule against the state and say, "Well, you're relying upon state
2 law and that's bad faith", which it seemed to be fairly ludicrous
3 to begin with.

4 Then the prospect was that the matter would be
5 referred to the Secretary of the Interior. The Secretary of
6 Interior has a trust responsibility to the tribes and no
7 responsibility to the states. And so that rather one-sided set
8 of circumstances led to a good number of states, California not
9 included, to raise the 11th Amendment. Seminole ultimately was
10 about the states and the states under the 11th Amendment and not
11 about Indians or Indian gaming but it clearly put a change into
12 the way IGRA was operating insofar that a state could get a case
13 brought against it dismissed in federal court.

14 As a consequence of the Seminole decision, there's an
15 argument to be made that IGRA no longer provides a remedy for
16 tribes if a state is truly recalcitrant and refuses to negotiate
17 in good faith for the games that it permits in its own state.
18 I'd like to make two points as to that. First of all, we're
19 unaware of any state of the union that has been truly
20 recalcitrant in relying upon its own state law to suggest that it
21 need not negotiate for something that it criminally prohibits.
22 So I want to make sure the Commission understand that point.

23 Secondly, we believe it's up to Congress to provide
24 for any remedy if a state raises the 11th Amendment and the case
25 is dismissed and not the Secretary. We don't believe that the
26 Secretary has any legal authority. There's no authority under
27 the law, federal law for the Secretary to, by regulations, do
28 that which Congress said the federal court could do and the

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1 Supreme Court said that the states could raise a jurisdictional
2 bar for.

3 So we believe that a statutory bypass to the
4 Secretary is the only way that that could be accomplished and the
5 Attorneys General recognize that that could be and should be on
6 the table as a matter of discussion for considered amendments to
7 the Indian Gaming Regulatory Act, some sort of statutory bypass
8 that allows a tribe to go to the Secretary. But in exchange for
9 a bypass, the Secretary of the Interior -- that goes to the
10 Secretary of the Interior, there ought to be some key
11 accommodations to the states including, and I list three or four
12 of them here; a grant of civil enforcement authority to the
13 states to stop illegal, uncompacted for gaming activities in
14 violation of IGRA and also a clarification that federal law
15 enforcement authorities have civil enforcement authority to stop
16 illegal, uncompacted for gaming activities in violation if IGRA.

17 Such authority in our view would provide an incentive
18 for tribal government to come to the table and negotiate for the
19 Class III gaming activities that are permitted in the state
20 rather than jumping the gun and resorting to self-help when the
21 matter seriously implicates federal criminal law. Also we
22 believe that IGRA itself could use some changes including an
23 obligation on both parties to negotiate in good faith, not just
24 the states.

25 If a tribe is violating federal law, including IGRA,
26 it doesn't come to the negotiating table with clean hands and it
27 makes it exceedingly difficult for the state, and you heard this
28 from Dan Kolkey, for the state to negotiate for those gaming

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1 activities that the tribe is already engaging in or for which the
2 state can't negotiate in the first place. Insult is added to
3 injury when it's the state, not the tribe, that gets hauled into
4 federal court for lack of good faith when the state articulates
5 its own understanding of its state criminal law as a basis for
6 its refusal to agree to games or gaming activities prohibited by
7 state law and thus by IGRA.

8 Another suggestion; good faith should be defined more
9 specifically to allow legitimate differences of legal and policy
10 views, including readings of the law, social and environmental
11 impacts, law enforcement concerns and related topics. Currently
12 with a one-sided good faith obligation on the states and little
13 guidance as to what constitutes good faith, states are the
14 parties that are hauled into federal court. My view is that any
15 incentive to keep the parties at the table and out of court works
16 better to accomplish the mutual ends of the parties. Even if a
17 true impasse results, it should not be held against two sovereign
18 governments that must work out their differences with mutual
19 respect and consideration at the negotiating table.

20 And I'd be pleased to answer any questions at the
21 conclusion. Thank you.

22 CHAIRPERSON JAMES: Thank you very much.

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