

**T E S T I M O N Y**



Statement of

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before the

National Gambling Impact Study Commission

on

Indian Gaming Issues

on behalf of

The National Governors' Association

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**NATIONAL GOVERNORS' ASSOCIATION**

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Good morning, Chairwoman James and distinguished members of the commission. I am Ray Scheppach, executive director of the National Governors' Association (NGA).

I appreciate the opportunity to appear before you today to provide the Governors' positions on a number of critical Indian gaming issues:

- The scope of Indian gaming activities subject to negotiation under the Indian Gaming Regulatory Act of 1988 (IGRA) and state law.
- Implementation and enforcement of IGRA, in particular, giving states the power to seek civil injunctive relief against illegal gaming that is outside the scope of compacts, or where there is a total absence of a compact.
- Constitutional issues raised by Indian gaming, including the role of states, Indian tribes, and the federal government, if any, in negotiating Indian gaming compacts.
- The effects of Indian gaming at the state and local levels, including environmental, economic, and social impacts to both tribal members and nontribal patrons and citizens.

### **Background**

In passing the Indian Gaming Regulatory Act of 1988, Congress struck a balance between state and tribal sovereignty, and granted Governors a critical role in regulating the emerging Indian gaming industry. In particular, Congress established a process through which states and tribes shall negotiate the terms under which tribes could operate "class III" gaming on Indian lands within a state. In the years since the enactment of IGRA, the vast majority of negotiations between states and tribal governments have resulted in successfully completed compacts. As of today, 146 tribes have concluded 171 compacts with 24 states. In spite of the U.S. Supreme Court's *Seminole* decision, the process created by IGRA continues to work, and states and tribes continue to negotiate compacts.

With states and tribes continuing to negotiate new compacts and renew existing compacts every month, the nation's Governors do not feel that IGRA needs to be significantly altered. The Governors have recently announced their intention to negotiate with tribes and the U.S. Departments of Justice and Interior for improvements and clarifications to IGRA that would benefit all parties. Staff meetings will begin later this summer in preparation for a meeting of principals in November.

## **The Scope of Indian Gaming Activities**

A primary concern for states continues to be clarifying the scope of the gambling activities permitted to tribes under IGRA. Much of the confusion and conflict that has arisen out of IGRA implementation centers around determining which gambling activities and devices are permitted by a state. The Governors assert that permitted gambling must be determined by reading a state's laws and regulations.

Amendments to IGRA must define the scope of the gambling activities and devices subject to negotiation under the law. It must be made clear that tribes can negotiate to operate gambling of the same types and subject to the same restrictions that apply to all other gambling in the state. The Governors firmly believe that it is an inappropriate breach of state sovereignty for the federal government to compel states to negotiate tribal operation of gambling activities that are prohibited by state law.

The U.S. court of appeals for the ninth circuit reached a decision consistent with NGA policy in the case of *Rumsey Indian Rancheria of Wintun Indians v. Wilson*. In *Rumsey*, the court found that IGRA neither compels a state to negotiate for gaming activities or devices that are prohibited by state law, nor requires a court to refer to the U.S. Supreme Court's decision in *California v. Cabazon Band of Mission Indians* to interpret the law. The Supreme Court denied the tribe's request for review of the *Rumsey* decision, effectively endorsing the ninth circuit's interpretation of IGRA.

Not all forms of class III gaming are the same. States have a fundamental public policy interest and responsibility to distinguish among different gambling activities and devices, choosing to legalize some and prohibit others. The Governors agree with *Rumsey* that "a state need only allow Indian tribes to operate games that others [in that state] can operate, but need not give tribes what others cannot have." Moreover, they believe that the *Rumsey* decision reflects what states believe to be the original intent of Congress.

## **Implementation and Enforcement of IGRA**

The federal government should actively and aggressively use enforcement authority under IGRA to shut down class III gaming conducted on Indian lands in violation of or in the absence of a tribal-state compact, either by civil or criminal means. IGRA should be amended to grant a state the right to seek injunctive relief in federal court to enforce this law. Effective enforcement against illegal and uncompacted gaming would encourage tribes to actively negotiate in good faith with states.

## **Constitutional Issues Raised by Indian Gaming**

Congress struck a balance between state and tribal sovereignty in passing IGRA. Central to this balance is the process through which a tribe and a Governor negotiate for the gaming that is to be permitted on Indian lands within the state. This process works, and will continue to work as long as changes to the negotiation process encourage active negotiation between state and tribal governments. To this end, the

Governors oppose any efforts by Congress or the administration that would allow a tribe to avoid negotiation with a willing state in favor of compact negotiation with another entity, such as the secretary of the U.S. Department of the Interior. Again, recently proposed federal legislation and regulations would allow a tribe that has not reached an agreement with a state to request that the secretary of Interior intercede and permit the desired gaming.

### **The Good-Faith Negotiation Requirement**

IGRA currently places a good-faith negotiation requirement on states, but not on tribes. This good-faith negotiation standard should be clarified and applied to both states and tribes. The burden of establishing lack of good faith should be on the party making such an assertion.

It is seldom the case that a state completely refuses to negotiate with a tribe. The question of a breach of good faith tends to arise when compact negotiations between states and tribes reach a stalemate over a tribe's demand to compact for gambling activities and devices that are prohibited by state law. A state's refusal to negotiate for gambling that is not legal in the state is not bad faith on the part of the state. NGA policy urges that any amendments to IGRA apply the good-faith standard to both states and tribes and clarify that limiting the compact negotiations to gambling activities and devices permitted by state law is not an act of bad faith on the part of the state.

### **Trust Land Acquisition**

The federal government must support its commitment to provide Governors with concurrent authority in the trust land acquisition process. Any amendments to IGRA should preserve the Governors' participation in this decisionmaking process—namely, that no trust land acquisition for gambling purposes should be possible without a governor's concurrence. Further, Congress should amend IGRA to require gubernatorial concurrence in the acquisition of trust lands for such nongaming purposes as commercial, industrial, or residential development, as these activities may have significant impacts on surrounding communities as well.

### **Limits on the Effect of Changes to State Law**

Governors are concerned that recently proposed federal legislation would limit states' ability to apply state law to Indian gaming. The proposal would appear to make applicable to existing tribal-state compacts only a change in state law that completely bans all class III gaming. By implication, any lesser ban of a particular game or games would not take effect with respect to existing compacts. Further, the proposal contained a provision that expanded the significance of compact publication in the *Federal Register*. Under this provision, the compact's publication would have served as "conclusive evidence" that such gaming activity is subject to negotiation under state law and would override any contrary provisions of state law or

determinations by a state's high court. The Governors opposed both of these proposals.

### **The Effects of Indian Gaming at the State and Local Levels**

Although many Indian gaming establishments provide substantial financial support to tribes and surrounding communities, these enterprises often have significant environmental, social, and economic impacts both on and off Indian lands. Recognizing this, several states have begun to include provisions within state-tribal compacts that address these concerns. The Governors support the IGRA process and believe that these compacts are an appropriate vehicle for addressing these legitimate environmental, social, and economic concerns.

### **Conclusion**

In conclusion, let me reiterate that Governors feel that the negotiation process in IGRA continues to work. As I mentioned earlier, Governors are committed to negotiations with tribes and the U.S. Departments of Justice and Interior. Staff meetings will begin late this summer in preparation for a meeting of principals in November. At these negotiations, a number of significant issues need to be addressed, including scope of gaming, dual good-faith negotiation requirement for both tribes and states, and federal enforcement of IGRA against illegal and uncompact gaming. Although the nation's Governors feel that IGRA does not require significant changes, there are improvements and clarifications that would benefit all parties.

The Governors respect the work of Congress and the administration to address the complex issues arising out of IGRA implementation. However, they oppose the draft rule proposed by the secretary of the Interior, which would allow a tribe to avoid negotiation with a willing state in favor of working through the secretary's office to achieve class III gaming. This is a major reversal of existing public policy and a substantial loss of authority for states. The nation's Governors strongly believe that no statute or court decision provides the secretary of the U.S. Department of the Interior with authority to intervene in disputes over compacts between Indian tribes and states about casino gambling on Indian lands. Such action would constitute an attempt by the secretary to preempt states' authority under existing laws and recent court decisions and would create an incentive for tribes to avoid negotiating gambling compacts with states. The secretary's inherent authority includes a responsibility to protect the interests of Indian tribes, making it impossible for the secretary to avoid a conflict of interest or exercise objective judgment in disputes between states and tribes. Governors have submitted comments to the department outlining these and other objections to the proposed rule and have offered testimony on numerous occasions before congressional committees outlining Governors' views of IGRA and various legislative amendments that have been proposed to IGRA.