COMMISSIONER LOESCHER: Madam Chair? You speak a lot about the Native American gaming in your paper. And in our subcommittee, working really hard with our honorable chairman from Mississippi, we are mandated by the Chair to address this issue of the impasse between states and tribal governments in the good faith negotiation thing.

And I have advocated in the committee that the states and the tribes are talking, as we speak, have been for several months working towards a resolution of that and that that process should be encouraged. And I believe that the states and the tribes can resolve these issues between and among them.

Then comes the second part of the question, that this Commission took a position on forestalling Secretary Babbitt’s promulgation of those regulations regarding good faith negotiations. And those matters are still pending by the Secretary.

Our group in our committee has been talking about I advocate for the good faith discussions in the continuing of this process between states and tribes. But then they ask me the hard rhetorical question: Bob, what happens if the impasse continues? How do you resolve it?

So we’re sort of pondering this question. We’ve come to the end, saying that: Well, maybe it ought to come back to the Secretary’s hands again between the states and the tribes. But this time it would have the Secretary making his final decision based upon a certain number of issues, criteria, and parameters that the Secretary should make a finding one way or
the other, either in favor of the states or the tribes, but have
a certain set of parameters that would have to be met before he
could make a final decision.

That seems to be one pathway maybe, but how do you feel
or how do the governors feel thinking about this set of
circumstances?

MR. SCHEPPACH: Well, it’s a tough one because what
would happen here is that governors would give up authority. And
I’d have to say any Secretary of Interior is suspect to the
conflict of interest. So they really don’t believe they’re going
to get a fair deal there.

The other issue in negotiation is that you always want
to get something when you give something. Most of the
discussions are giving up gubernatorial authority.

And although I think we’re willing to entertain some
movement there, we would like to get some things in exchange,
more concurrence on trust lands, enforcement, allowing a state to
go into court to enforce illegal gaming that’s happening in
tribes, particularly in California and Florida.

So our feeling is that we need to put some of the other
things on the table if we’re going to give up our Eleventh
Amendment rights.

COMMISSIONER LOESCHER: Madam Chair, just one more
thing. When you say you’ll leave the illegal gaming, you mean
uncompacted gaming?

MR. SCHEPPACH: Yes.
COMMISSIONER LOESCHER: Okay. The other thing is the business of -- two points. One is the impasse between the tribes and the states has its roots in the U.S. Constitution. And the legal scholars tell me that the tribal existence occurred before the states’ rights occurred in this section of the Constitution. And so that’s why tribes in this question of the difference between what the states’ rights are and what the tribal rights are are rooted in the Constitution.

The best way is to find some kind of way to find an answer between the two that resolves it in a reasonable way. Is that your understanding as well?

MR. SCHEPPACH: Well, we have always looked at it that both are sovereign nations and they are equal.

COMMISSIONER LOESCHER: Okay.

MR. SCHEPPACH: I think a lot of the problems revolve around the scope of gaming. And if the scope of gaming were clearly defined, -- and we think the Rumsey decision does that -- then the compacting process would be a lot smoother.

I think personally a lot of times there are problems because the tribes want to negotiate outside what’s legally available for other citizens in the state. And that’s where the problem comes down.

COMMISSIONER LOESCHER: Madam Chair, just one more, and I’ll be satisfied.

The business, you know, some people suggest that there’s a problem, that the states don’t have a right to tax Indian gaming enterprises. And there is a concept that one
government shouldn’t tax another government. But there are arrangements that are made between and among the tribes and the states and which are outside of the notion of tax, one government to another.

And I like to use the term "exclusivity payments" that the tribes are not allowing themselves to be taxes, but outside of the compact terms, there are agreements made as a basis for other consideration where payments are made from the tribes to the states.

Example, in Connecticut, that’s done. I think there are other examples as well. And that seems to be a fair arrangement when those agreements are reached voluntarily with a mutual agreement between the states and tribes.

Do you have a view on that?

MR. SCHEPPACH: I think you’re right. Our sense is that all of these issues ought to become part of the compacting process. We are having increasing problems with respect to environmental issues, zoning issues, transportation issues, as well as tax issues. I mean, the tax issues around tobacco and gasoline are bubbling up as well.

So there are a lot of tough issues, I would say, between tribal governments and states now, but our feeling is that it ought to be done on a case-by-case basis. They ought to sit down and try to negotiate it.

We may differ a little bit on the number of compacts that are in place somewhere between 171 and 189, I guess. But let’s say there’s been a lot of successful compacts during the
particular process. And I think because we are having some problems doesn’t mean that the process has not worked.

Now, I haven’t looked over what has happened over the last year, but I’m told that compacts are still being done. So I think there has been a fair amount of success.

COMMISSIONER LOESCHER: Thank you, Madam Chair.

CHAIRPERSON JAMES: Thank you.

COMMISSIONER LEONE: I just want to make sure I understand that the position of the governors is that there is no need for additional federal legislation in the Indian gaming area.

MR. SCHEPPACH: Well, if we could clarify issues such as scope of gaming so that it became very ironclad clear that the Rumsey decision that the state never had to negotiate outside what other citizens have available in this state, we would like that.

Right now there is an inconsistency. There is a bad faith against the state, but there’s no bad faith against the tribe. So there’s things that we would like to have fixed, but basically the law we believe has been working.

COMMISSIONER LEONE: This is a little off the tribal gaming, but are there other areas where you think governors have a position where they think there should be federal legislation? I know the attorneys general do in a couple of areas. Do the governors --

MR. SCHEPPACH: Well, the only area that --
COMMISSIONER LEONE: -- take any apart from tribal
gaming and gambling?

MR. SCHEPPACH: Yes. Well, the whole issue of
bringing other commercial properties onto reservations and being
exempt from taxes.

COMMISSIONER LEONE: No. I mean, away from tribal
issues, like internet gambling or telephone gambling or things --

MR. SCHEPPACH: Well, yes. I mean, we would support --

COMMISSIONER LEONE: Has the association taken a
position on --

MR. SCHEPPACH: On internet gaming, yes. We’re opposed
to internet gaming.

COMMISSIONER LEONE: Any of the other forms of
electronic gambling that are out there; for example, the cable
television telephone pari-mutuel betting activity?

MR. SCHEPPACH: We really haven’t taken any positions
on that.

COMMISSIONER LEONE: You haven’t taken a position on a
lot of things.

COMMISSIONER BIBLE: If I understood your position
correctly, you’re willing to negotiate on the dispute resolution
process as long as you have the scope issue tightened up and
defined in such a manner that the tribes would not be able to
offer gaming opportunities that are not available to other
citizens of the state.

MR. SCHEPPACH: I think that’s right. Scope of gaming
is --
COMMISSIONER BIBLE: Those two are linked.

MR. SCHEPPACH: Right. That’s exactly right.

COMMISSIONER BIBLE: And so I assume when the subcommittee talks about this issue, they’ll talk about both the scope issue and the dispute resolution issue.

CHAIRPERSON JAMES: Will you?

COMMISSIONER MOORE: We are talking about that. The states say that compacts are working. And, you know, we have records that say that most of them are.

The states that have casino and no doubt just opened class three gaming, I would assume that those states have not much trouble with the compact with the American Indians.

MR. SCHEPPACH: I think that’s right. I think that’s right.

COMMISSIONER MOORE: Yes. Then we come to those states that want to bring in a little money, and they have a lottery. And maybe that’s the only thing that they have in the lottery. I think what you’re seeing is a lottery is Class 3.

So if you have a Class 3 lottery in Louisiana, -- we’re picking on Louisiana -- what if the Indians wanted to come in, you were the governor of Louisiana, and wanted to put a casino in Louisiana? Now, this is what you’re talking about, the scope.

In other words, because you have one form of gaming that’s Class 3, does that allow them to have any form or do you want them just to have lottery?

MR. SCHEPPACH: The lotteries.

COMMISSIONER MOORE: You want them to have --
MR. SCHEPPACH: That specific game. Okay? And this is a serious problem. And I think what’s happened, how we got to where we are is that the courts interpret it very, very broadly, like you said. And that’s what’s led to the increase in gaming.

COMMISSIONER MOORE: Maybe in the course that they say that they can have anything they want. And if the state doesn’t want it, maybe they would be a little bit more careful about having a lottery.

MR. SCHEPPACH: Well, I don’t disagree that the beginning of the lotteries has not contributed to expanding this, but if you trace a lot of the lotteries, they actually went back and did referendums with the whole population in the state before they did the law.

That isn’t true everywhere, but they were concerned enough about it to actually go back to citizens and say specifically, "Do you want it?" Okay?

COMMISSIONER MOORE: One more question. It seems like when you have an impasse there is no such thing as one side acting in good faith. I believe that any deal is pulled off if people go away happy. Then they’ll come back and deal with each other again. You know, each one of them thinks they got the best end of it. So that’s what needs to be with a compact. So it’s got to be each side in good faith.

Now, we also know that every land deal that you want to do or any deal that you want to do doesn’t always come to fruition. So we’re at an impasse.
Now, this subcommittee is going to come up with a recommendation of some kind of how to solve that impasse. Whether the full Commission goes along with it is another story, but I’ll bet they will. And so we need some suggestions and some know-how on where to go.

I agree with you wholeheartedly. I think going to the Secretary of Interior is about like going to my wife, and she doesn’t know anything about Indian gaming.

MR. SCHEPPACH: It’s hard for me, but I’ll pass on commenting on that.

COMMISSIONER MOORE: You must have discussed this. I mean, here you are representing the executive director of the governors. You are representing all the governors of America. You have discussed this.

If we can’t get it from you people, who are dealing with compacts, we’re not going to be able to get it from Native Americans. They like it the way it is. I can tell you that. I’ve heard enough testimony. They like it all the way from up yonder in Connecticut to Albuquerque, New Mexico.

MR. SCHEPPACH: Well, again, without getting into details, I mean, I think there is a package which includes being very specific with respect to the scope of gaming.

I think most of the problems is that if the tribes don’t get their scope of gaming, they’re headed to the court and claiming bad faith. Okay?

So if you’re very clear on that and then, second of all, the good faith/bad faith goes in both directions, you’ve got
to be willing to shut down I’ll correct myself and say
uncompacted gaming, which is a significant problem.

States have to have the right to go into federal court
with respect to uncompacted gaming. And you’ve got to deal with
some of the trust provisions.

In other words, there’s a broad deal here if you’re
going to talk about some kind of an expedited process that you’ve
got to be willing to exchange something and minimize the
interests of going to the court.

I mean, one of the things that IGRA tried to do and I
think did a reasonable job is that you’ve got to create that
tension so it’s better for the states and the tribes to sit at
the table and negotiate until they get an agreement, as opposed
to going to the Secretary of Interior or to the courts. They’ve
got to stay at the table until they work it out.

COMMISSIONER MOORE: I use illegal gaming. I don’t use
compact too much because if it says that they must have a compact
before that they can have Class 3 gaming, then we’ve got to come
up with a recommendation somehow to make sure that there’s no
slot machines. We’ll use that because I understand the slot
machines a little bit.

There will be no slot machine in any state on any
reservation until a compact has been reached. And then there
would be no illegal gaming out there.

MR. SCHEPPACH: What I’m saying is that I wonder
sometimes: If a tribe can set up uncompacted gaming, why do they
sit at the table if nobody shuts it down? The state can’t go
into the court, and the federal government refuses to. What incentive is there to stay at the table?

COMMISSIONER MOORE: I’m just saying that that’s got to be a recommendation, I think, I know from the subcommittee, I believe. But we need help.

MR. SCHEPPACH: I’m trying to give you a little bit.

CHAIRPERSON JAMES: Commissioner Lanni?

COMMISSIONER LANNI: Just for Commissioner Loescher, you talk about the exclusivity fees, which do exist in Connecticut. I’m aware of that. In fact, they also exist in other states, in which they find federally recognized Native American gaming facilities within states.

Michigan is one of the perfect examples with some 17 in that regard. The day the first commercial casino opens in Michigan, which is probably the end of this summer or the beginning of fall, those fees will stop coming to the State of Michigan. However, not all states have given exclusivity agreements to those fees.

For example, Michigan in four new compacts that have been approved by the legislature in Michigan and the governor in conjunction with the Native American tribes calls for payments at a different level but to continue for the newly compacted entities, rather than the prior ones.

So they’re not always on an exclusivity basis. There are times when they obtain fees, taxes, whatever one wants to call them, revenue enhancements to the government regardless, even if exclusivity is not the issue.
And I, for one, did raise the issue that, as I said before, I support Native American gaming. I think it should be limited to whatever form of gaming exists within the state in which they find their particular facility.

However, I think they should help in some fashion to deal with the services that they are causing to be delivered without paying for them in certain instances and some form of fee arrangements, taxes, what have you, with the local and state governments.

I might add one other thing. This is more of a statement to Mr. Scheppach. I think that I couldn’t agree with you more that there should be good faith requirements on both the Native American side and the governors’ side. However, I must tell you, even though I am a Republican and a supporter of Pete Wilson, I think he was not very much dealing in good faith when he was dealing with the Native Americans in California and probably brought about more than he ever expected to be brought about as a result of that.

So I think, even if you have requirements, not necessarily do the governors always follow those requirements of good faith. But I think there should be a requirement. I agree with you on both sides.

COMMISSIONER LOESCHER: Madam Chair?
CHAIRPERSON JAMES: Certainly.
COMMISSIONER LOESCHER: Maybe one more. I can hardly let this gentleman go without inquiring. The internet gaming business, I have a perception that internet itself is a problem
to states, commerce conducted over the internet. And the problem
is that states haven’t figured out how to tax it and get
reporting of that.

Some day somebody is going to figure this out. And I’m
sure it’s going to happen sooner than later because of the volume
of commerce that’s beginning to occur.

Once they figure that out, then I think the states will
be embracing internet commerce. Taking it one step further to
internet gaming, if you can regulate taxes and whatever you want
to do on the internet for commerce, then internet gaming is just
one step away as a commodity or service, whatever.

I have been interested in the notion that once the
states are able to solve these kinds of problems, I believe that
intrastate commerce will be fully endorsed and possible commerce
between and among states will probably be endorsed. And then
gradually federalism will take over and we’ll have unitary tax or
some kind of thing on the internet.

What are your views with regard to where the states
stand now just on being able to regulate and tax the internet?
And is that of concern to the governors?

MR. SCHEPPACH: It’s a fairly complex subject, but let
me say first off that state sales taxes are use taxes. And,
therefore, I think you’re a resident in Alaska. And I think that
if you ordered something over the internet from the State of
California and the tax collector from Alaska happened to be at
your doorstep when that package came, you would be obligated to
shell out the taxes on that item.
The issue is because it’s interstate commerce, the Supreme Court said that you cannot force a seller outside the state to, in fact, collect the tax. It’s not that you’re not liable for it. It’s that we can’t force an out-of-state seller.

This has been a problem for mail order sales. States lose about $4 billion on $100 billion worth of sales. The internet rate now, we probably don’t lose much at all because it’s in its infancy, in all honesty. But projections are it will go to $300 billion within the next 5 years and our loss in revenues at that time will be 20 billion.

We have at the state level some problems because we have different classification systems and different audit procedures. And we have the problem at times where local sales tax is in addition to state sales taxes.

We are in the process now of agreeing to a common set of definitions, a common audit procedure, and working with states to put one rate that would be a blend of the local rate as well as the national one.

Once we fix our problems, we will ask the Congress to enact legislation that people have to pay the tax. There are no technological problems on this. A lot of people say: If you’re in one state and you collect tax in another state, how do you know?

Well, it’s very clear. All states, the only thing that matters is where you receive the goods and since any order has to be shipped to a certain place and there’s already software available.
So we’re not anti-internet. In fact, we’re trying to clean up what we think is a legitimate business problem to the classification. And at that time, we’ll ask Congress to give us the right.

It is an issue of equity. How can you in a state ask the local retailer to collect the tax and not have it collected from somebody else? You cannot support a tax that is inequitable in that sense.

And if the states are not allowed to tax it, the federal government is eventually going to tax it under the interstate commerce clause. You saw Congressman Tozin the other day.

I’ll stop. This is a whole new subject, but I’d be happy to talk about it later.

CHAIRPERSON JAMES: Thank you. And we do appreciate your comments. We are in probably one of the most critical phases of our work as a Commission and want to thank you for your patience today as you waited to offer your suggestions before us. But if we could as we continue through this process pick up the phone and call you if we wish to ask you for additional input, we would consider that very helpful. I’m sure the various subcommittee members and chairmen would as well. With that, I’d like to thank you very much for being here today.

MR. SCHEPPACH: Thank you.

CHAIRPERSON JAMES: Thank you.

MR. FINNEGAN: Thank you very much.