CHAIRPERSON JAMES: Mr. Gede?

MR. GEDE: Good morning.

CHAIRPERSON JAMES: Good morning.

MR. GEDE: I come to this Commission this morning with two principal messages. First, I believe that the states of the union have accepted their obligation to negotiate in good faith with the Indian tribes under IGRA and that they have, in fact, commenced invited or negotiated, conducted negotiations in good faith, only to face endless litigation, 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 the differences rather that fly out the door to a courtroom or to the Secretary of Interior for an administrative remedy when there is a difficult question or a difference of opinion at the negotiating table. Unfortunately IGRA provides an incentive for litigation over negotiation and I'd like to elaborate as to both points.

In my view most of the difficulty in the past 10 years relating to IGRA has revolved around allegations by tribes that 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, under IGRA itself. Now 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 the tribes and the states to rely upon some agreed upon mechanism for the use of state regulatory resources. Of course, Congress understood that a state would only have regulatory resources for those gambling activities it permitted and that clearly would not have regulatory resources for gambling activities that are 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. That state of affairs apparently had never been satisfactory for the tribes that had insisted upon the use of video gambling devices even where such devices are prohibited under state law. These devices are normally prohibited on Indian lands under the Johnson Act, under federal law and can only become legal on Indian lands under IGRA when the tribe and the state compact for such devices in a state where the devices are permitted in the first place. That's the nature of the Johnson Act and IGRA in operation together.

This Commission heard, yesterday, I believe from Dan Kolkey, Governor Wilson's legal affairs secretary, who I believe helped the Commission with the question of the scope of gaming and suffice it to say that the states have ultimately prevailed.
in cases such as the Rumsey case in clarifying what the scope of
gaming is in the Indian Gaming Regulatory Act. Congress set
forth a statutory standard. And while you will hear discussion
of Cabazon v. California recognize that allegations or assertions
that Cabazon somehow gives the tribes an unfettered right to
gamble on Indian lands is not what Cabazon said.

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

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

The states did not raise the 11th Amendment as a
jurisdictional bar to the litigation brought by the tribes out of
spite or bad faith or sometimes alleged racism or anti-Indian
sentiments. The states raised the 11th Amendment because of a
flurry of lawsuits brought against the states for insisting upon
an interpretation of what state law meant with respect to video
gambling devices in those states and the additional prospect that
if -- and this is pre-Rumsey, the federal courts were going to
rule against the state and say, "Well, you're relying upon state
law and that's bad faith", which it seemed to be fairly ludicrous
to begin with.

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

As a consequence of the Seminole decision, there's 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 the games that it permits in its own state.
I'd like to make two points as to that. First of all, we're
unaware of any state of the union that has been truly
recalcitrant in relying upon its own state law to suggest that it
need not negotiate for something that it criminally prohibits.
So I want to make sure the Commission understand that point.

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

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

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

If a tribe is violating federal law, including IGRA, it doesn't come to the negotiating table with clean hands and it makes it exceedingly difficult for the state, and you heard this from Dan Kolkey, for the state to negotiate for those gaming
activities that the tribe is already engaging in or for which the state can't negotiate in the first place. Insult is added to injury when it's the state, not the tribe, that gets hauled into federal court for lack of good faith when the state articulates its own understanding of its state criminal law as a basis for its refusal to agree to games or gaming activities prohibited by state law and thus by IGRA.

Another suggestion; 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 as to what constitutes good faith, states are the parties that are 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 at the negotiating table.

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

CHAIRPERSON JAMES: Thank you very much.