

Statement of  
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before the  
Indian Affairs Committee  
United States Senate  
on the  
Intergovernmental Gaming Agreement Act of 1999  
on behalf of  
The National Governors' Association

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Good morning, Mr. Chairman and distinguished members of the committee. I am Ray Scheppach, executive director of the National Governors' Association (NGA). Thank you for the opportunity to appear before you today to convey the Governors' position on S. 985, proposed legislation entitled the "The Intergovernmental Gaming Agreement Act of 1999."

**The Successful Record of the Indian Gaming Regulatory Act of 1988**

In the years since the enactment of the Indian Gaming Regulatory Act of 1988 (IGRA), the vast majority of negotiations between states and tribal governments have resulted in successfully completed compacts. As of today, approximately 155 tribes have concluded more than 195 compacts with twenty-four states. This track record demonstrates that states have implemented IGRA in good faith. Difficulties do remain in a few states where tribes and states differ with respect to the scope of gambling activities and the devices subject to compact negotiations. Most IGRA court cases have arisen because of a tribe's insistence on negotiating for gambling activities or devices that are otherwise illegal in the state. The record of states negotiating in good faith is strong. However, the breadth of current Indian gaming that is uncompact raises serious questions about the enforcement of IGRA by the federal government.

## **Scope of Gaming**

The scope of gambling activities and devices subject to negotiation under IGRA has always been the Governors' key concern. However, the Governors' problems with the interpretation of IGRA with respect to the scope of gaming seem to have been resolved by the courts. 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 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 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. The Governors cannot support amendments to IGRA that would erode the *Rumsey* interpretation of the scope of gaming under IGRA.

The Governors firmly believe that it is an inappropriate breach of state sovereignty for the federal government to compel states to negotiate tribal operations of gambling activities that are prohibited by state law. The *Rumsey* decision now clearly articulates this principle, and the Governors urge your support for this interpretation of current law that has been upheld by the United States Supreme Court.

### **Compact Negotiation Process**

Any changes to the compact negotiation process should increase the incentive for active negotiation between states and tribal governments. 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. The relationship between tribes and states is complex and broad, covering land rights; hunting and fishing rights; land use and zoning matters; health care, education, and job training programs; taxation; and many other issues besides gaming. Governors entered into discussions with tribes in mid-1998 to explore the possibility of negotiations on the most pressing issues. Persistent efforts by the secretary to change the relationship between states and tribes with respect to the compact negotiations process could affect many of these necessarily related issues, as well as bias the process toward increased gambling activities.

As the National Gambling Impact Study Commission pointed out only a few weeks ago, gambling has significant social impacts that require effective public policy and regulation. If Congress were

now to give the secretary of the Interior the ability to create gaming compacts, it would seriously undermine state efforts at regulation.

### **Governors Oppose S. 985**

The cumulative nature of the changes S. 985 makes in IGRA would tip the balance between state and tribal sovereignty that has made IGRA successful. There would no longer be any incentive for tribes to undertake serious negotiations with states. Without that incentive, the entire process of negotiating becomes meaningless. As written, S. 985 would actually centralize the process of negotiating compacts and regulating casino gaming in the federal government, a situation the states find totally unacceptable. The Governors strongly oppose this legislation.

### **Specific Concerns with S. 985**

I'd like to take a few minutes to list specific provisions in the bill that the Governors oppose.

1. S. 985 literally removes the obligation on tribes to seek negotiations with states in order to conduct casino-type gaming. S. 985 says that tribes "may" negotiate with states rather than the phrase in IGRA, which states that tribes seeking to engage in Class III gaming "shall" negotiate with states.

2. S. 985 creates a bypass mechanism that would weaken the likelihood of successful tribal-state negotiations. First, S. 985 sets no threshold for invoking the bypass, merely that the tribe request these negotiations in writing and specify each gaming activity the tribe proposes for inclusion in the compact. Second, S. 985 gives the tribes' an incentive to use the bypass because of the secretary's statutory role as an advocate for tribal interests. Such an apparent conflict of interest can only undermine productive negotiations at the state level.
  
3. The bypass mechanism S. 985 creates is far more sweeping than what the secretary established in his final rule issued in April. Under the secretary's rule, the secretary would only commence negotiations when a court had held in favor of a state against a tribe seeking a compact, and then only if the court's finding was based on the state's 11<sup>th</sup> Amendment immunity. As I Just mentioned, S. 985 only requires that a tribe contact the secretary with a list of their proposed gaming activities in order to trigger the mediation process.
  
4. S. 985 would require that all decisions on challenges to compacts under IGRA be heard by the United States District Court for the District of Columbia. I understand why the committee and the Department of the Interior, both of which are located here in Washington, D.C., would seek such a venue. But the vast majority of tribal-state compacts that have been negotiated are hundreds or thousands of miles away from that court. This appears to be some sort of new federal "one-court-fits-all" solution.

5. S. 985 also specifically permits the secretary to determine the meaning of state law: "The publication of a compact (negotiated by the secretary) shall be conclusive evidence that the Class III gaming subject to the compact is an activity subject to negotiations under the laws of the state." Under IGRA, when the courts oversaw mediation between a state and a tribe, the final compact had to be consistent with state law. S. 985 has reversed this, making the negotiated compact itself state law. The Governors oppose such a serious threat to our federal system. But S. 985 deviates even further from IGRA, setting as the standard for the secretary's approval of a compact that it be consistent with regulations promulgated by the National Indian Gaming Commission, apparently more important than state constitutions, laws, and regulations. This is not at all consistent with IGRA, nor is it good public policy.
6. S. 985 retains the same one-sided requirement that states must negotiate in good faith while Indian tribes have no such responsibility, only here the secretary of the Interior is the judge and jury. Even the provisions of IGRA protecting states that raised concerns about gambling's impact on the community have been deleted. Accusations of a breach of good faith tend 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. The Governors believe that a state's refusal to negotiate for gambling that is not legal in the state is not an act of bad faith on the part of the state.
7. S. 985 calls on the National Indian Gaming Commission (NIGC) to regulate Class III gaming when the secretary establishes a compact in the absence of a state-tribal compact.

Again, this is outside the scope of IGRA. States and tribes are required to negotiate responsible and fair regulations and procedures for the regulation of casino gaming. NIGC was never intended to become the primary regulator of casino gaming on Indian lands.

8. S. 985 would limit what compacts may include, while IGRA was open-ended and permissive, leaving states and tribes to work out whatever terms and provisions were acceptable to both sides. The National Gambling Impact Study Commission specifically called on the federal government to permit states and tribes to work out their differences. S. 985 moves in the opposite direction. The Governors prefer the language of IGRA.

### **Impact of State Law on Compacts**

There is one new provision in S. 985 that does interest Governors. The final section of the bill would permit changes in state law that occur after the establishment of a tribal-state compact to change the terms and conditions of that compact. This would happen in the case where a new state law affects the public policy of the state with respect to permitting or prohibiting Class III gaming. Governors have expressed concern that public policy on gaming is up to the citizens of each state, and that just because a compact has been signed doesn't mean that citizens will not pressure their elected officials to restrict gambling further.

In fact, The National Gambling Impact Study Commission has called for a moratorium on any new gambling operations or expansion of existing operations. If that recommendation gains support, it is likely that many states will see bills introduced that go at least that far to lessen the harm that many citizens believe gambling causes. The Governors support the committee's

examination of this issue. Any congressional action on this matter needs to consider whether it is possible to set a time period on existing compacts after which they too would be subject to changes in state law.

### **Conclusion**

The Governors respect the committee members' continuing efforts to resolve the complex issues arising out of IGRA implementation. However, the Governors strongly oppose S. 985 as currently drafted, because it would substantially change the successful operation of IGRA, seriously upsetting the current balance between states and the tribes with respect to the compact negotiation process. Again, thank you for the opportunity to share the Governors' concerns on this legislation. I would be glad to respond to your questions.