

TESTIMONY

**Statement of
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before the

Indian Affairs Committee

United States Senate

on the

Indian Gaming Regulatory Improvement Act of 1999

on behalf of

The National Governors' Association

March 24, 1999

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. 399, proposed legislation titled the "Indian Gaming Regulatory Improvement Act of 1999."

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 over 195 compacts with 24 states, many of them since the enactment of IGRA. Difficulties 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 Indian gaming today that is uncompact raises serious questions about the enforcement of IGRA by the federal government. It is unfortunate that the proposed legislation does not address this important issue.

I am confident in telling you that the nation's Governors will strongly oppose any congressional or administrative attempts to reduce the state role in implementing the Indian Gaming Regulatory Act. Although S. 399 does take some important steps in codifying federal regulation of Indian gaming, Generally it would put states in a far worse position than current law. Therefore, the Governors strongly oppose this bill as it is currently drafted.

The rest of my statement will focus on:

- the scope of gaming
- the compact negotiation process;
- the good-faith negotiation standard;
- the establishment of minimum regulatory standards; and
- the membership of the National Indian Gaming Commission.

Scope of Gaming

We have all worked on this issue long enough to know that the scope of gambling activities and devices subject to negotiation under IGRA has 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 gaming 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 object to S. 399's references to *Cabazon* and its holding. These amendments would create a great deal of confusion for states, tribes, and courts, reversing the progress made to date with respect to IGRA implementation and leading to continued litigation. The Governors have long decried the lack of uniformity with respect to the implementation and court interpretation of IGRA and have consistently called for congressional clarification of the statute. 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 encourage 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 a complex and broad relationship, 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 begin 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.

Good-Faith Negotiation Standard

Another issue related to the compact negotiation process is the good faith negotiation standard. S. 399 fails to address the Governors' concerns that this standard currently applies only to states. It is seldom the case that a state completely refuses to negotiate with a tribe. Most often, a state comes to the table in good faith-ready to negotiate with a tribe. 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. 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. NGA policy urges that any amendments to IGRA apply the goodfaith 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.

Establishment of Minimum Regulatory Standards

The Governors recognize that federally imposed regulatory standards for the operation of tribal gaming facilities may sometimes be appropriate. However, they

are interested in protecting the interests of Indian tribal governments and casino patrons as well as preserving the integrity of the gambling operations. NGA policy supports the bill's intent to leave regulatory oversight responsibilities -- subject to federal standards to be established by the National Indian Gaming Commission, in the hands of states and tribal governments, as negotiated in their compacts.

Detailed regulations were published earlier this year. The Governors are pleased that these regulations are written not as maximal standards, but, rather, minimum standards. It is important that regulations pursuant to negotiated compacts be permitted to exceed these regulatory standards. States and tribes should retain the prerogative to establish more stringent regulations for the gambling activities. We are pleased with this aspect of the regulations, and that it is supported in the proposed legislation.

Membership of the National Indian Gaming Commission

The Governors want to again express their concerns that the commission requires representatives of tribes but does not require representatives of states. We believe this weakens the commission. The compact negotiation process established by IGRA shows that the sovereignty of states and tribes requires negotiations between the two parties. The failure of IGRA to reflect that balance in the commission membership continues in this legislation. As the commission takes on the regulatory responsibilities outlined in S. 399, the committee should take steps to address this imbalance.

Conclusion

The Governors respect the committee members' continuing efforts to resolve the complex issues arising out of IGRA implementation. However, they strongly oppose S. 399 as currently drafted, as it would substantially change the current balance between the states and the tribes with respect to the compact negotiation process.

The Governors remain committed to resolving these issues and stand willing to assist the committee. A copy of NGA's Indian gaming policy is attached to my testimony. I would be happy to answer your questions.

(attachment on next page)

NATIONAL GOVERNORS' ASSOCIATION

NGA Policy

EDC-6. THE ROLE OF STATES, THE FEDERAL GOVERNMENT, AND INDIAN TRIBAL GOVERNMENTS WITH RESPECT TO INDIAN GAMING AND OTHER ECONOMIC ISSUES

6.1 Preamble

The Governors recognize and respect the sovereignty of Indian tribal governments and support economic advancement and independence for tribes. State and tribal governments must continue to work together on many significant issues. Governors value their important relationships with tribal governments.

There is no question that by enacting the Indian Gaming Regulatory Act of 1988 (IGRA), Congress intended to provide states with a meaningful role in determining which gambling activities and devices would be conducted under a tribal-state compact. Therefore, implementation of IGRA requires a fair balance between state and tribal sovereignty.

As a state's chief executive officer and the primary defender of state sovereignty, a Governor has the ultimate responsibility to act in the best interests of all state citizens. Although the gambling activities conducted under IGRA occur within the boundaries of tribal lands, they are designed to attract nontribal patrons, and the effects of these activities are felt far beyond the geographic boundaries of the reservations.

The Governors have long decried the lack of uniformity with respect to the implementation and court interpretation of IGRA and have consistently called for congressional clarification of this statute. Although several problems exist- the states' primary concern continues to be gaming the scope of the gambling activities permitted to tribes under the act. 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 Governors remain committed to resolving the conflicts arising out of IGRA implementation. Any amendments to the act must address the Governors' principal concerns and ultimately must be designed to keep states and tribes in negotiations and out of court. In addition, the Governors urge Congress and other federal entities to include them in decisions that will have an impact on states.

6.2 IGRA Reform

Ambiguities in the current law have led to inconsistent court interpretations of the act. Amendments to IGRA should be designed to encourage state and tribal governments to work together to resolve conflicts that may arise during the compact negotiation process. IGRA should be amended to resolve the following issues.

6.2.1 Clarification of the Scope of Gaming. 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's public policy. The Governors assert that gambling public policy 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. Ultimately, a Governor must not be compelled by federal law to negotiate for gambling activities or devices that are not expressly authorized by state law, although the Governor may have the discretion to negotiate across a broad range of options.

6.2.2 Application of the "Good Faith" Negotiation Standard. The "good faith" negotiation standard set forth by IGRA must be clarified and applied to both states and tribes. Further, the burden of proving an allegation should rest with the party making the allegation. Inability to agree on a compact should not be treated as an indication of bad faith by either party. In particular, a state's adherence to its own laws and constitution should not be regarded as bad faith.

6.2.3 Regulatory Oversight. The Governors recognize that in many cases, federally imposed minimum regulatory standards for the operation of tribal gambling facilities may be appropriate. In general, careful regulatory oversight is necessary to protect the integrity of the gambling activities and the interests of patrons, the states, members of tribes, and Indian tribal governments.

Congressional establishment of minimum regulatory standards should not preempt stricter state laws, nor should it prevent states from negotiating with tribal governments for more stringent regulatory standards as part of a tribal-state compact.

State and tribal governments should determine their respective regulatory oversight roles through the tribal-state compact negotiation process. If such standards are established, the federal government's oversight role should be limited to cases in which the state and tribe fail to meet established minimum regulatory standards.

6.3 The Effect of the *Seminole* Decision on the Authority of the Secretary of the U.S. Department of the Interior

The U.S. Supreme Court fortified state sovereignty in its March 1996 decision in *Seminole Tribe of Florida v. Florida*. Clearly, the *Seminole* decision rendered the judicial remedy contained in IGRA unenforceable against a state unwilling to consent to federal jurisdiction. In the wake of the decision, however, questions have been raised

about whether the secretary of the U.S. Department of the Interior can unilaterally create a process through which tribal operation of Class III gaming can be authorized in the event a state invokes the Eleventh Amendment defense.

As the Governors interpret the effects of *Seminole*, nothing remains in IGRA or any other law that endows the secretary with the authority to independently create such a process. IGRA continues to be the sole mechanism through which tribal governments can operate Class III gaming. It is unthinkable that a Supreme Court decision endorsing state sovereignty could become the vehicle for an inappropriate expansion of the secretary's authority.

The Governors will actively oppose any independent assertion by the secretary of the power to authorize tribal governments to operate Class III gaming. State and tribal governments are best qualified to craft agreements on the scope and conduct of Class III gaming under IGRA.

6.3.1 Congressional Delegation of Authority to the Secretary. If Congress delegates to the secretary of the U.S. Department of the Interior the authority to provide a remedy to a tribe in the event a state raises the Eleventh Amendment defense to suit the secretary's ability to permit tribal Class III gaming must be strictly limited to what is allowed under the state's gambling laws, regulations, and ordinances.

6.4 Federal Enforcement

The federal government should actively and aggressively use existing IGRA enforcement authority to shut down Class III gaming conducted on Indian lands in violation of or in the absence of a tribal-state compact.

6.5 The Governors' Role in Congressional and Other Federal Decisionmaking

The Governors should have a concurrent role in any action taken by Congress that would have a significant impact on states, including federal recognition of new tribes and acquisition of trust lands for tribes. Tribal recognition through any federal administrative procedure should require the concurrence of the Governor(s) of the state(s) in which the tribe is located.

6.5.1 Trust Land Acquisition for Gambling Purposes. Congress must support its commitment to provide Governors with concurrent authority in the trust land acquisition process. Congress must 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. The U.S. Department of the

Interior has acknowledged that a Governor's concurrence is required before noncontiguous land can be acquired for gambling purposes. The ability of a Governor to give partial concurrence to a tribe's proposal to take land into trust for gambling purposes, such as when a Governor's is willing to authorize the playing of some types of games but not others, should be recognized. Additionally, the secretary should establish

procedures to permit the views of all affected Governors to be heard when a gambling proposal will have an impact across state lines.

6.5.2 Trust Land Acquisition in General. The Governors also must have concurrent authority with respect to other trust land acquisition decisions undertaken by the U.S. Department of the Interior.

6.5.2.1. State and Local Taxation Authority Over New Trust Land. Removing land from state and local tax roles may have a significant economic impact on many states and localities. Therefore, Congress should take action to require that before new land is taken into trust by the U.S. Department of the Interior, the state and the tribal government must reach a binding agreement regarding the application of state and local taxes on new trust land. Such an agreement could include a waiver by the state of any taxation authority on the new trust land.

6.6 Commitment to a Solution

The Governors are committed to resolving the complex issues involved in the implementation of IGRA and the management of other congressional and federal decisions that have an impact on the states in this area.

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Adopted Winter Meeting 1997; reaffirmed Winter Meeting 1999.*