



PECHANGA INDIAN RESERVATION

Temecula Band of Luiseño Mission Indians

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TESTIMONY OF MARK MACARRO TRIBAL CHAIRMAN OF THE PECHANGA BAND OF LUISEÑO MISSION INDIANS

BEFORE THE NATIONAL INDIAN GAMING COMMISSION
REGARDING
THE CLASSIFICATION OF GAMES UNDER THE
INDIAN GAMING REGULATORY ACT

SEPTEMBER 19, 2006

Good afternoon, Mr. Chairman and Commissioner Choney. Thank you for the opportunity to testify regarding the efforts of the National Indian Gaming Commission to revise the manner in which games are classified under the Indian Gaming Regulatory Act.

My name is Mark Macarro, and I am the Tribal Chairman of the Pechanga Band of Luiseño Mission Indians (federally recognized since 1882). The Pechanga Indian Reservation is located adjacent to Temecula, in southern California, where we operate the Pechanga Resort and Casino. We have been in operation since 1995, and currently employ more than 5,000 people.

Gaming has become an important source of revenue for both the Band and our local economy. It is for this reason that I am here today to voice my opposition

to the Commission's current efforts. It is our belief that this rulemaking threatens not only the viability of class II gaming, but in fact, all of Indian gaming. One need only consider the events of the last several weeks to see the long-term implications of this rulemaking.

For the past several years, a number of California tribes have been attempting to renegotiate our gaming compacts. While our failure to reach agreement has often been characterized in the press as being solely about revenue sharing, in truth, it has been about attempts to subject the tribes to an unusual degree of local and outside control.

After much negotiation, a compromise was eventually reached. Nonetheless, because of politics as usual, and the influence of a labor union with a history of corruption, we were unable to even obtain a legislative hearing or vote on our Compact. As it stands, we must return to fight another day, and we plan to do just that. Getting to this point, however, was not easy, and we must ask ourselves, where would we be without the alternative of a viable class II market?

If the Commission moves forward with this rulemaking, all existing class II games will become class III. While new class II games will eventually be developed, because of the arbitrary requirements this rulemaking would place on them, these new class II games will be so slow and cumbersome as to render them unprofitable.

Under the existing regulatory scheme, California tribes were able only to negotiate a Compact that could be viewed, at best, as an unbalanced compromise. What will happen when we have no other option? When we have no viable alternative to class III gaming? Unfortunately, the state will simply assume that it is only a matter of time before the tribes are willing to agree to its demands, however outrageous they might be. Our leverage will become a thing of the past, and tribes will be at the mercy of uncooperative states.

It is because of this eventual result that the Pechanga Band strongly opposes this rulemaking. Why does the Commission feel the need to destroy an entire class of gaming? The existing scheme is in line with IGRA, and models the holdings of the courts. In fact, we understand that the Commission's existing definitions have been upheld by both the 8th and the 10th Circuit Courts of Appeal. The Commission is acting alone here. There has been no court ruling or congressional enactment that supports the agency's current actions.

The Commission mistakenly asserts that if it does not provide a "bright line" between what is class II and what is class III, Congress will step in, and eventually put an end to all of Indian gaming. The Commission claims that because of advancing technology, the Act is being stretched, that it is not working as intended, and that class II gaming is awash with slot-machine facsimiles.

In reality, Congress anticipated that class II gaming would grow alongside technology. As has often been noted, Congress intended that tribes have "maximum flexibility" to utilize class II gaming for the purposes of economic

development. Technology is never intended to limit the commercial success of a product or an industry. I challenge you to point to just one industry where the addition of technology was intended to hinder its development. The bottom line is that there is no Congressional intent that class II gaming not be profitable.

Interestingly, it is only the Commission – and the Justice Department for that matter – that seems confused by the distinctions between class II and class III games. The courts understand these differences, and believe me, so do our customers. For some reason, however, the Commission now wishes to require that class II games be visibly different from those that are class III. This ludicrous conclusion clearly is devoid of any credible analysis (legal, industry-based or otherwise).

IGRA does not require that a player be able to discern between the two immediately upon approaching the games – and the courts have said as much. To place such a requirement on class II gaming is simply ridiculous. And perhaps more importantly, it frustrates the intent of IGRA. If, however, the Commission is so concerned with the outward appearance of the games, then simply require us to put a sign on them and be done with it. Remove all other arbitrary requirements from the regulation. The Commission has produced no evidence that the general public is confused or at risk. There is no justifiable reason to restrict the flexibility Congress so clearly intended.

Returning to the Commission's claim that if they do not act, Congress will, I would argue that the Commission is saving Congress the trouble. By decimating

the negotiating power of tribes, it is only a matter of time before Tribal-State Compacts are a thing of the past.

And I would add that if the Commission is so concerned with provisions of the Act that are not working as intended, why is it not actively pursuing a *Seminole* fix? Why is it not seeking an express exemption to the Johnson Act for technologic aids? Respectfully, I believe that the Commission's time would be better spent restoring the balance Congress so clearly intended when it enacted IGRA than by placing arbitrary restrictions on class II gaming. At the very least, the Commission should avoid unwarranted efforts that tilt this balance even further away from the tribes.

Again, I would like to thank you for the opportunity to provide our views on the Commission's current endeavors. I am happy to answer any questions you may have.

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