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**Subject**

11/28/94 MEMO PROVIDING AG WITH AN ANALYSIS OF THE 9TH CIRCUIT’S DECISION ON 11/15/94 IN "RUMSEY V. WILSON" & AN ASSESSMENT OF ITS IMPACT ON ENFORCEMENT AGAINST ILLEGAL GAMING IN 4 FED’L DISTRICTS IN CA

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<th>6. EXEC ASST Review</th>
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<td>Dave Margolis</td>
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**Instructions**

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DEPARTMENT OF JUSTICE
EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: HARRIS, JO ANN, AAG, CRM & TORRES, GERALD, COUNSEL TO THE AG
To: AG. ODD: 12-05-94
Date Received: 11-29-94 Date Due: 12-05-94 Control #: X94113032563
Subject & Date
11-28-94 MEMO PROVIDING THE AG WITH AN ANALYSIS OF THE
NINTH CIRCUIT's DECISION ON NOVEMBER 15, 1994, IN THE CASE
"RUMSEY v. WILSON" AND AN ASSESSMENT OF ITS IMPACT ON
ENFORCEMENT AGAINST ILLEGAL GAMING IN THE FOUR FEDERAL
DISTRICTS IN CALIFORNIA; THRU DAG.

Referred To: Date: Referred To: Date:
(1) DAG; GORELICK 11-30-94 (5) SPEC:
(2) (6)
(3) (7)
(4) (8)
INTERIM BY:
Sig. For: DAG

Remarks
(1) FOR INITIALIZING ON THE "THRU" LINE. RETURN TO EXEC. SEC.
FOR FORWARDING TO OAG.

Other Remarks:

FILE:

REMOVE THIS CONTROL SHEET PRIOR TO FILING AND DISPOSE OF APPROPRIATELY
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MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Jo Ann Harris, Assistant Attorney General
Criminal Division

Gerald Torres
Counsel to the Attorney General

SUBJECT: Rumsey Decision

PURPOSE

The purpose of this memorandum is to provide you with an analysis of the Ninth Circuit's decision on November 15, 1994 in Rumsey v. Wilson and an assessment of its impact on enforcement against illegal gaming in the four federal districts in California.

BACKGROUND

Several tribes in California had asked the state to negotiate a compact permitting them to operate certain kinds of stand alone electronic gaming devices, including slot machines, and live banking and percentage card games. Under the Indian Gaming Regulatory Act (IGRA), these are classified as Class III games and, therefore, can only be operated with a compact. States are required to negotiate compacts if the state "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. s. 2710 (d)(1)(B).

California refused to negotiate contending first, that the Class III gaming sought by the tribes was illegal under state law; and second, that IGRA compels states to negotiate compacts in violation of the Tenth Amendment.

All parties entered into a stipulation and sought a federal judicial determination of whether negotiations must take place. The district court held that, except for banked and percentage card games, California must negotiate. The state appealed and the tribes cross-appealed.
While the Rumsey case was pending in the Ninth Circuit, the four United States Attorneys in the State of California were withholding any enforcement action against the tribes. In the Southern District of California, the United States Attorney publicly consummated on oral "stand still" agreement with the tribes which allowed them to continue to conduct Class III gaming so long as they did not expand their operations.

THE RUMSEY DECISION

The Ninth Circuit declined to reach the Tenth Amendment issue because it found the scope of gaming issue dispositive. It affirmed the district court judgment that banked and percentage card games were illegal under California law and remanded the case to the district court on the narrow question of whether California permitted slot machines in the form of video lottery terminals. The Ninth Circuit narrowly interpreted the "scope of gaming" language in the Indian Gaming Regulatory Act holding that California need only negotiate compacts for the specific kinds of Class III gaming it permits, stating in its opinion

[w]ith the possible exception of slot machines in the form of video lottery terminals, California has no obligation to negotiate with the tribes on the Proposed Gaming Activities...

Rumsey v. Wilson, slip op. at 13888 (9th Cir.), Nov. 15, 1994.

IMPLICATIONS

The significant enforcement issue impacted by Rumsey regards thousands of stand alone slot machines which are not video lottery terminals and which are being operated in tribal casinos throughout California without compacts.

On November 18, 1994 a conference call was placed to the four United States Attorneys in California. As a result of this conference call consensus was reached in the three areas discussed.

First, as long as California tribal gaming operations are maintained at the current status quo, no federal enforcement action will be taken until the court issues a mandate in the Rumsey case. In the event that a mandate is not issued in a timely manner, e.g., as a result of the filing of a petition for re-hearing, this matter will be revisited by the United States Attorneys in consultation with the Criminal Division.

Second, it was agreed the United States Attorneys will consult with the Criminal Division before any action is taken in response to the issuance of a mandate. It is contemplated that the first action taken will be the delivery of "cease and desist"
letters to the tribes. For the sake of consistency within the State, the same basic "cease and desist" letter will be used in all four districts.

Should "cease and desist" letters fail to achieve the peaceful termination of illegal gaming, appropriate civil enforcement options will be considered as the next step down the road to compliance.

Finally, no formal press release on this matter will be issued at this time. However, Departmental representatives should respond to queries about the Rumsey decision by stating that we are in consultation on the matter, and that we are exploring all options while we await the issuance of the mandate which will finalize the decision.
MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: ENFORCEMENT OF THE INDIAN GAMING REGULATORY ACT

As a result of developments in Indian gaming law, and actions taken in a number of districts, I wish to amplify the policy set forth in my March 25, 1994 memorandum on this subject.

The Department's overall goal is the "peaceful termination of ... illegal operations ... within a brief but reasonable time." This goal is compatible with the Department's duty to enforce the law, as well as with its responsibility to work in good faith with the tribes.

While gaming laws vary from state to state and different circumstances may exist in each federal district, any decision by one United States Attorney as to how to achieve the Department's goal in his or her District may have far-reaching consequences for other United States Attorneys with gaming in their districts. It is important, therefore, that every United States Attorney be kept informed of activities in other districts and that each United States Attorney's response to Indian gaming issues -- however different because of different circumstances -- be compatible with the Department's policies.

For these reasons, I have asked the Assistant Attorney General for the Criminal Division to serve as the coordinating and communicating center for the enforcement of the Indian Gaming Regulatory Act. No action with respect to Indian gaming should be taken without consultation with her well in advance of the planned action.

In addition, each United States Attorney with Indian gaming in his or her district should provide to the Assistant Attorney General of the Criminal Division an assessment of the gaming situation and a proposed strategy for dealing with it. Please submit your assessment and strategy by September 9, 1994.

Criminal Division Deputy Assistant Attorney General Kevin V. DiGregory is available to answer any questions and provide any assistance on this matter. His telephone number is: (202) 514-9725.

I appreciate your cooperation.
MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Jo Ann Harris
    Assistant Attorney General
    Criminal Division

Gerald Torres
    Counsel to the Attorney General

SUBJECT: Action Plan for Criminal and Civil Enforcement of the
         Indian Gaming Regulatory Act (IGRA)

PURPOSE: To provide guidance for the United States Attorneys,
         supplementing the memorandum of March 25, 1994

TIMETABLE: ASAP

DISCUSSION: At a meeting on July 27, 1994, with several affected
United States Attorneys, the Chairperson of the AGAC Subcommittee
on Indian Affairs, Jo Ann Harris and representatives of the
Criminal Division, Gerald Torres and representatives of his
office, and representatives of the Deputy’s office, the following
was agreed as the short-term plan to handle Indian Gaming issues:

1) You should issue the attached memorandum to all United
   States Attorneys. The attached memorandum reiterates your policy
   of securing peaceful termination of illegal gaming, which for the
   most part consists of electronic gaming conducted without the
   tribal-state compact required by the IGRA.

   The memorandum attempts to balance the desirability of
   a uniform policy with the variations in conditions existing in
   the several districts by requiring timely consultation with the
   Assistant Attorney General, Criminal Division (through Kevin
   DiGregory) before action is taken. It also requires the United
   States Attorneys to provide an assessment of the situation in
   their districts and a strategy for dealing with it within one
   week of the date of the memorandum.

2) You should conduct a conference call with affected
   United States Attorneys. As a follow up to the memorandum, it
   was agreed that you conduct a conference call with the affected
   United States Attorneys in which policies that cannot
appropriately be stated explicitly in writing (e.g., reserving criminal prosecution as a last resort) can be discussed, the need for consultation can be emphasized, and the role of the Criminal Division as a clearinghouse can be explained.

3) **The Criminal Division should act as a clearing house.** At the request of the AGAC Subcommittee, the Criminal Division will provide the United States Attorneys with reports on the actions taken by their colleagues and other matters relevant to IGRA enforcement.

**RECOMMENDATION:** Approve the recommendations.

**APPROVE**

**DISAPPROVE**

**OTHER**

Dated: August 18, 1994
TALKING POINTS FOR CONFERENCE CALL WITH UNITED STATES ATTORNEYS

PURPOSE OF CALL

To amplify the message of the Memorandum to all U.S. Attorneys by exploring some tactical considerations that militate in favor of a measured response in this area.

OBJECTIVE

To terminate tribal gaming that is not operated in conformity with the law.

Differences in Districts

- The Department recognizes that the conditions in each district vary;
- that state-tribal relationships vary from state to state and reservation to reservation;
- that IGRA is in significant part assimilative of varying state laws;
- that state attitudes towards gaming vary; that resources and priorities vary.

Overall Approach

Congress has sanctioned high stakes gaming as an appropriate measure for tribal economic development and revenue raising.

Congress has recognized the need for regulation of high stakes gaming and prescribed the regulators of the several classes of gaming.

Gaming that is not regulated as prescribed by law should cease but its termination does not warrant confrontation or the risk of violence.

Preferred Approach to Enforcement

A graduated and measured response:

- meet with the tribes who are operating illegally, request that they cease operations, negotiate a timetable;
- if gaming persists, send a cease and desist letter to the tribes, informing them that enforcement action will be considered should they continue;
- if enforcement action becomes necessary, civil remedies should be explored first, particularly where there is a dispute
between the tribe and the state concerning the legality of the gaming.

**Contact between U.S. Attorneys and the Department**

- Consultation with the Criminal Division required **before** any action taken.

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FROM: Jo Ann Harris
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Gerald Torres
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3) The Criminal Division should act as a clearing house. At the request of the AGAC Subcommittee, the Criminal Division will provide the United States Attorneys with reports on the actions taken by their colleagues and other matters relevant to IGRA enforcement.

RECOMMENDATION: Approve the recommendations.

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MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: ENFORCEMENT OF THE INDIAN GAMING REGULATORY ACT

A number of United States Attorneys have inquired about the Department's current policy towards illegal gaming in the Indian country. Because of the sensitivity of the issue and because there have been recent significant developments, I think that it is appropriate that I address this subject.

In dealing with Indian tribes we must always be mindful of two components of federal-tribal relations. One is the government-to-government relationship we maintain with these quasi-sovereign entities, and the other is the responsibility the federal government has to the tribes for their well-being and protection. It is against this background that Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988. The Act provides a complex system of regulation and oversight that is designed to allow tribal governments to raise needed revenue and to shield those operations from criminal infiltration.

I turn now to the truly sensitive issue of what should be done about illegal gaming conducted by tribal authorities. When the IGRA was enacted, Congress, recognizing that neither the tribes nor the federal government had the expertise to regulate more sophisticated forms of gaming, provided that Class III games should be conducted by the tribes pursuant to a state-tribal compact. It further provided that a tribe could sue a state to compel it to negotiate a compact in good faith. This aspect of the act has recently been put into question by the Eleventh Circuit opinion in Seminole Tribe v. State of Florida, Dkt. Nos. 92-4652, 92-6244.

Although a number of states and tribes have successfully concluded compacts, many tribes are operating casinos or video gaming machines without a compact, in violation of the IGRA, 18 U.S.C. 1166(a), and the Johnson Gambling Devices Act, 15 U.S.C. 1175, as well as the Organized Crime Control Act, 18 U.S.C. 1955. I appreciate that the road to agreement between the states and the tribes has not always been a smooth one,
however, at this writing, I believe that most of the legal uncertainty concerning Class III gaming without a compact has been exhausted. The overall constitutionality of the Act has been upheld, the classifying regulations of the NIGC have been sustained, and arguably ambiguous terms of the Act have been clarified by litigation. Of particular importance is the recent decision of the Court of Appeals for the District of Columbia Circuit in Cabazon Band of Mission Indians v. NIGC, Dkt. No. 93-5255, decided January 28, 1994, which held that electronic pull-tab devices are Class III games and therefore require a compact to be legally played in Indian country. In view of this decision, I encourage each of you to review the status of gaming that may be operating in your district. If you find any illegal gaming, the peaceful termination of those illegal operations should be negotiated with the Tribes within a brief but reasonable time.

While uniformity of enforcement is desirable, we recognize that conditions vary from state to state, district to district and reservation to reservation. In determining when to act and what action to take, due consideration should be given to the provisions of state gaming law, the history and status of tribal-state negotiations -- in particular whether there is currently or has been good faith negotiating by both parties, the relationship of your office to tribal and state authorities, and other factors of importance in your community.

The tribes and their members have shown themselves to be law abiding citizens and their compliance is anticipated. Each of you should be assured that your judgment on whether and how to proceed will be respected and your efforts will be supported by all the resources available to us.

In view of the sensitive nature of these matters, I would appreciate your notifying me in advance with an Urgent Report of significant enforcement action.