

1 COMMISSIONER JAMES: I'm going to ask that you please  
2 be seated, and ask staff to have people in the back of the room  
3 to please come forward, take a seat. I have a couple of  
4 announcements before we get started. I'm going to ask you to  
5 please bear with us, and let's see if we can have some order in  
6 the room. Thank you very much.

7 One quick announcement. A purse was found in the  
8 room. If anyone is missing their purse they can claim it at the  
9 front desk. And the hotel has asked me to announce that they  
10 prefer that lunches be eaten outside, and they've made some  
11 tables available when we do go on break after the next set of  
12 panels. Thank you.

13 I'd like to introduce Ms. Allison Flatt, who's the  
14 Associate Research Director on the Commission's staff, and thank  
15 her very much for her hard work in preparing the paper that we're  
16 going hear today. Allison will offer us a briefing on Native  
17 American Gambling, specifically focusing on some of the complex  
18 legal and constitutional issues involved.

19 Allison.

20 MS. FLATT: Thanks. Good afternoon.

21 The purpose of this briefing is to provide to you  
22 some background on the legal, constitutional, and regulatory  
23 issues associated with Native American gambling so that you'll  
24 have a better context for the expert testimony today and tomorrow  
25 in Tempe.

26 Since I am kicking off this portion of the hearing  
27 today, I'll use this opportunity to warn you that this is an  
28 extremely complex issue involving a very complicated Federal

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1 Statute and years of litigation. Public policy on Native  
2 American gaming has been simultaneously influenced by judicial  
3 decisions, the legislative process, and the initiative referendum  
4 process, and it has brought in legislators, governors, Tribal  
5 Council members, prosecutors, judges, lawyers, lobbyists, public  
6 interest groups, and grassroots organizations, all of whom have  
7 different but important perspectives. I'll also add the obvious:  
8 This is a highly charged issue.

9 To many people attending the hearing today, this is  
10 bigger than casinos on Indian Reservations and economic impacts.  
11 And that is because this is also the latest battleground for the  
12 conflicts between three distinct sovereigns, the federal, state  
13 and Tribal governments. And these conflicts have existed in this  
14 country for over 200 years. Nowhere is all of this more evident  
15 than here in California where there has been a highly publicized  
16 conflict between many of the Tribes and the Governor. Although  
17 not typical of the development of Native American gambling in  
18 other states in that it represents one extreme, it is an  
19 excellent example of the dynamics between the federal, state and  
20 Tribal governments.

21 To provide some background on these broad issues, I  
22 will be focusing on just a few subjects that are particularly  
23 important to understanding the testimony that will be presented  
24 here today. These are: Tribal sovereignty; the Federal Statute  
25 that governs Indian gaming, known as the Indian Gaming Regulatory  
26 Act; and some related regulation and enforcement issues. Tribal  
27 sovereignty is at the core of the tensions between the federal,  
28 state and Tribal governments. Sovereignty is a word of many

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1 interpretations, and it is used frequently and loosely in the  
2 debate over Indian gambling. I am certain that you will hear  
3 many references to it today and tomorrow, so I will attempt to  
4 give you some of the history behind it. It should be noted,  
5 however, that this is an extremely sensitive, if not sacred,  
6 subject to the Tribes and their advocates because it is also  
7 associated with the preservation of their cultural identity and  
8 independence. Therefore, any explanation I can provide in a  
9 couple of minutes is likely to be inadequate to a lot of people  
10 in this room. The basic definition, of course, is "the  
11 independent right or power to govern". The legal concept as  
12 applied to Native American Tribes is stated in the Constitution  
13 and further defined through judicial decisions which have limited  
14 it in certain areas over the years. Prior to the arrival of  
15 North Americans to North America, Native American Tribes were  
16 sovereign. They were independent and they conducted their own  
17 governmental affairs. During the colonization of America the  
18 British Crown dealt formally with the Native American Tribes as  
19 foreign sovereign nations. As the colonies grew and strengthened  
20 population it became apparent that the colonists were encroaching  
21 more and more upon Native American land.

22           Upon independence from Britain it was feared that if  
23 Native American affairs were left to the states, territorial  
24 conflicts would result in new wars with the Tribes that the  
25 United States, exhausted from the Revolution, was in no position  
26 to fight. The Constitution was therefore drafted so that the  
27 Federal Government would have responsibility for Native American  
28 affairs. Congress was granted the power to "regulate commerce

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1 with the Indian Tribes", and the President was empowered to make  
2 treaties with the consent of the Senate.

3           The legal status of the Tribes as sovereigns was  
4 further defined through a series of Supreme Court cases in the  
5 early 1800's. These cases limited the concept of sovereignty and  
6 described Native American Tribes as "domestic dependent nations",  
7 whose independence was restricted in two areas, the power to  
8 convey their land, and the right to deal independently with  
9 foreign powers. For all internal matters, however, the Tribes  
10 were sovereign and free from state intrusion. It wasn't until  
11 the 1970's that additional judicial limitations on Tribal  
12 sovereignty were implemented. Although many Native Americans  
13 would disagree with this terminology, Tribes are now often  
14 described under the law as "sovereign dependent nations  
15 possessing inherent governmental power over internal affairs".  
16 States are precluded from interfering in Tribal government, but  
17 Tribes are subordinate to the United States Congress.

18           Congress can unilaterally modify or even nullify  
19 treaties with Native American Tribes, but the Federal Government  
20 also has a trust relationship to them. For instance, Native  
21 American Tribes have the right to inhabit the lands retained by  
22 them through treaties or otherwise, but Tribes do not actually  
23 hold title. The land belongs to the Federal Government who holds  
24 it in trust for the Tribes.

25           The Indian Gaming Regulatory Act, also known as IGRA,  
26 was enacted in 1988. It enabled Tribes to operate gambling,  
27 including casino gambling, on their Reservations so long as that  
28 type of gambling was legal in the state in which the Reservation

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1 was located. Now, IGRA divides gambling into three different  
2 classes.

3 Class I gambling is social gambling in traditional  
4 American games. They may be operated by a Tribe without any  
5 restrictions.

6 Class II is bingo, pull-tabs, and nonbanking card  
7 games such as poker. Class Two gambling is regulated jointly by  
8 the Tribe and the National Indian Gaming Commission, which is the  
9 Federal Indian Gaming Regulatory Agency, and it does not require  
10 an agreement with the state. These agreements are called  
11 compacts, by the way.

12 Class III gambling includes most casino-style games,  
13 including slot machines, roulette, and blackjack. Class Three  
14 gambling is regulated by the Tribes, states and the NIGC, and it  
15 requires a compact with the state in which the Tribe is located.

16 The passage of IGRA was preceded by court decisions  
17 holding that Tribes could operate casino gambling free of most  
18 state regulations. Therefore, although IGRA is widely regarded  
19 as the beginning of the modern era of Tribal gambling, many  
20 Tribes view it as an encroachment upon Tribal sovereignty because  
21 it provides the states a role in negotiating the role -- the  
22 scope, excuse me, and the regulation of casino gambling. IGRA  
23 has generated considerable litigation, some of which has focused  
24 on the constitutionality of the statute. It has also brought to  
25 the surface tough questions about how to reconcile conflicts over  
26 state and Tribal sovereignty.

27 I would just like to highlight a few of the areas  
28 that have been problematic and that remain unresolved. First,

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1 the compacting process. A state is required by IGRA to negotiate  
2 in good faith with Tribes to conclude a compact. IGRA provides  
3 that if the state refuses to negotiate in good faith a Tribe can  
4 file what is known as a "bad faith" lawsuit in Federal District  
5 Court. A recent Supreme Court decision known as Seminole in  
6 effect gutted that provision. In the Seminole case the State of  
7 Florida raised the Eleventh Amendment of the Constitution as a  
8 defense, and the Eleventh Amendment provides that -- it prevents  
9 states from suing other states. And in this case the State  
10 argued that since the Tribes are sovereign entities they too  
11 should be prevented from suing. The Supreme Court agreed. Now,  
12 if the state asserts an Eleventh Amendment defense to a bad faith  
13 lawsuit, the case may be dismissed, and there is no further  
14 recourse for the Tribe. And the Secretary of the Interior is  
15 still negotiating with state and Tribal officials to develop some  
16 alternative administrative rules to allow Tribes a remedy when  
17 they assert that a state has not negotiated with them in good  
18 faith.

19 These proposed alternative rules are very  
20 controversial and will be addressed by some of our panelists.

21 The second major litigation producing area is the  
22 scope of gaming allowed under IGRA. Now, assuming a state allows  
23 some form of Class III gambling, which as you may remember is the  
24 casino-style gambling, the question raised in litigation is  
25 whether the Tribe may, therefore, operate any other type of Class  
26 III game. Several states have argued that they should not be  
27 forced to negotiate and regulate games that are otherwise illegal  
28 in the state, even if they are very similar to other games that  
are permitted in the state, and some courts have agreed. Other

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1 courts have held that if a state permits any Class III game then  
2 the Tribes are permitted to operate any and all Class III games  
3 as well. A related problem is the classification process for new  
4 games. Since Tribes do not need a compact with the states to  
5 offer Class II games, they generally prefer that the games be  
6 classified as such. As new games are developed there is often  
7 controversy over how they should be classified. And this is all  
8 further complicated by the fact that the NIGC and the U.S.  
9 Department of Justice have responsibilities that require them to  
10 determine whether a game is Class II or Class III, and they  
11 sometimes make different determinations. These inconsistencies  
12 between two federal agencies necessarily cause big problems for  
13 the Tribes because they may receive a letter from two different  
14 agencies that contradict each other, leaving it unclear what is  
15 permissible.

16 A third problem area is that some provisions of IGRA  
17 have been practiced creating difficulties for the states since  
18 they have a limited role under the statute. For instance, states  
19 are not empowered to act against Native American Tribes if the  
20 Tribes are operating gambling establishments without a compact,  
21 such as here in California, or in violation of the compact. Only  
22 the Federal Government has enforcement power, and in some  
23 instances the Federal Government has chosen not to act. States  
24 cannot tax Tribal gambling revenue or impose a property tax on  
25 gambling facilities unless it is allowed through the compacts.  
26 But they are required to provide some form of regulatory  
27 oversight from local taxes and Native American Class III casino  
28 games. Tribes are exempt from local taxes and local regulations

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1 such as zoning, building, and environmental codes, but state and  
2 local governments must provide and service the infrastructure  
3 that makes the land valuable for casino development. In local  
4 municipalities this may mean that huge casinos with hotels,  
5 restaurants, do not fall within their jurisdiction, but they are  
6 nonetheless required to deal with the consequences.

7           Although there is no standard formula in IGRA, some  
8 states have negotiated with tribes for a percentage of gambling  
9 revenues to pay for the collateral affects of casinos on Indian  
10 lands. Other compacts stipulate that Tribes must share the costs  
11 of police, fire protection, hospitals and roads, and these  
12 arrangements vary from compact to compact. But the structure for  
13 regulation and enforcement of Native American gaming is another  
14 area of concern for states, but also for the federal and Tribal  
15 governments. All of them have an interest in preserving the  
16 integrity of the games offered. As a consequence of IGRA and the  
17 various Tribal state compacts, the regulation of Native American  
18 Gaming is varied and often difficult to implement.

19           As I explained earlier, regulation involves different  
20 government agencies depending on the classification of games as  
21 I, II, or III. The Federal Government, in the form of the  
22 National Indian Gaming Commission; the Tribe, in the form of the  
23 Tribal Gaming Office or Commission; and the state, through  
24 whatever agency it designates, each have a role in the regulation  
25 of gaming on Indian lands. In addition, the ability to enforce  
26 criminal laws is the exclusive jurisdiction of federal law  
27 enforcement. Now, the Tribes maintain that they are the most  
28 heavily regulated segment of the gambling industry, and that they

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1 have to deal with frustrating inconsistencies in trying to comply  
2 with the rules of several different regulating agencies.  
3 However, states often complain that despite the fact that there  
4 are three separate regulatory bodies with some authority over  
5 Tribal gambling, no one has complete authority. For this reason  
6 state officials maintain that there are serious oversights, and  
7 that it is incredibly difficult to have a regulatory regime that  
8 depends on the consensus of political entities with diverse and  
9 sometimes conflicting interests.

10 In conclusion I'll just reiterate that Native  
11 American gambling and IGRA are testing the tensions between the  
12 federal, state and Tribal governments. Today's panelists will  
13 explain how difficult this has been in California for state and  
14 Tribal government officials who have struggled to come to a  
15 satisfactory agreement. Many other states are anticipating  
16 renegotiating and possibly renewing compacts that will be  
17 expiring in the next several years. These governments will be  
18 forced to reconsider the complex legal constitutional and  
19 cultural issues associated with Native American gambling, along  
20 with the attendant social and economic impacts. Since IGRA  
21 dictates the relationship of these three sovereign entities to  
22 Native American gambling, future legislative amendments to IGRA  
23 are likely to be targeted in resolving these problem areas that  
24 lead to endless litigation rather than to mutually satisfying  
25 compacts.

26 Before I sign off I'd just like to elaborate on the  
27 recent activity on the Internet gambling legislation that the  
28 Chair mentioned in her opening statement, because it does have

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1 ramifications to Native American gambling. She said on July 23rd  
2 the U.S. Senate voted 90 to 10 in favor of the Kyl Bill to ban  
3 most forms of gambling on the Internet. In the process, on an 82  
4 to 18 vote they rejected an amendment by Senator Larry Craig from  
5 Idaho that would have accepted Indian tribes from the ban. Now,  
6 Kyl had opposed this amendment saying that a Website operated  
7 from an Indian Reservation could be accessed by anybody who uses  
8 the Internet, and therefore, this would have created a huge  
9 loophole. A similar bill is pending in the House, and if it  
10 passes it is likely that Tribes will be prohibited from offering  
11 gambling on the Internet.

12 That's all I have.

13 CHAIRPERSON JAMES: Some questions before we proceed  
14 to the panel?

15 Let me just take this opportunity to say thank you to  
16 Allison. As you're aware, Allison is -- I hate to say moving  
17 onto bigger and better things, because we think we're pretty big  
18 and pretty good, but she is going over to the National  
19 Association of Attorneys General, which is where we stole her  
20 from in the first place, and she will be greatly missed on the  
21 staff. She has made a tremendous contribution. I will also add  
22 that Amy, who is not here today, fits in that category as well,  
23 and she has accepted a tremendous opportunity to go back and work  
24 for her home state Senator, and we cannot thank you enough. And  
25 so on behalf of the entire Commission, thank you for your  
26 tremendous contribution to our work. You are appreciated.

27 MS. FLATT: Thank you.

28 COMMISSIONER LOESCHER: Madam Chairman?

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1 CHAIRPERSON JAMES: Yes.

2 COMMISSIONER LOESCHER: I appreciate the overview  
3 presented by Allison. Also I'd like to commend to the  
4 Commissioners a paper that she wrote, Overview of Native American  
5 Gambling Legal and Regulatory Issues, dated July 21, 1998, which  
6 is more specific on the comments that she made, and I highly  
7 endorse her paper as a good overview.

8 Thank you.

9 CHAIRPERSON JAMES: Thank you, and the Commissioners  
10 do have that available in their briefing books.

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