

1 CHAIRPERSON JAMES: Mr. Dickstein.

2 MR. DICKSTEIN: Thank you. My name is Howard
3 Dickstein and I represented the Pala Band during these
4 negotiations. I also represent a number of tribes in California,
5 some of which are gaming, some of which are non-gaming. Four of
6 the other tribes I represented have recently entered into
7 compacts with the State of California over the past several
8 weeks. And I think I'm in a unique position to address some of
9 these issues because I've been involved in this dispute since its
10 inception.

11 I've been on the litigating plaintiff's side in
12 Rumsey v Wilson which led to the Ninth Circuit decision which
13 you're heard about that defines gaming. And I've been counsel in
14 some California Supreme Court cases that delineated importantly
15 the scope of gaming allowed to the State Lottery because that
16 scope is also available to tribes. And I was also involved in
17 the negotiations in 1994, the consolidated negotiations. So, I'm
18 going to try to give you some perspective. You've heard a great
19 deal of rhetoric today and I don't -- I think most of the issues
20 have come out and the positions have been made clear and I don't
21 want to repeat them.

22 Obviously, you know where my client, the Pala Band
23 stands on these issues. But looking at your statute and your
24 charter, and trying to figure out what interest you have in this
25 dispute, many of the issues that have been discussed will be gone
26 including the proposition long before your review report comes
27 out. It struck me that what happened in California really is a
28 symptom of some of the problems with IGRA. And, I've thought of

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1 five or six of them, and I'll just mention those now and then try
2 to deal with some of the points that I've heard over the past
3 hour or two that I may have different views on than those that
4 have been mentioned.

5 I think first the assumption under IGRA was that
6 there would be compacts before Class III gaming commenced. It
7 was 1988, there wasn't much consciousness that machine gaming was
8 already beginning. In California it began shortly after that
9 time if not at that time. And it began before the compacts were
10 actually negotiated or before anyone had the opportunity to
11 negotiate them. There was no way that it could have been done
12 that quickly.

13 In retrospect it was kind of naive because this thing
14 was already taking off and the industry was developing and tribes
15 were beginning to recognize the importance of gaming and how they
16 could achieve their interests and obviously we all know that
17 electronic forms of gaming are what makes money. That's what
18 people like and tribes weren't just going to hang around and
19 wait.

20 In particular in California, you had pretty
21 sophisticated Class II operations and some court decisions before
22 IGRA which appeared to give the tribes a great deal of discretion
23 over the type of gaming that they were engaged in and tribes
24 moved forward with those court decisions and began to develop
25 regulatory systems which they were comfortable with and for the
26 most part have proven to be good ones. There are exceptions but
27 tribes obviously believe with good reason that they have
28 protections in place.

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1 That doesn't mean, however, that other governmental
2 entities or people off the reservation always agree and I think
3 that's the point of IGRA, is to try to take all the -- all of
4 this into account.

5 So what happened I think initially is that once you
6 have Class III gaming, for whatever reasons, and that's what
7 happened in California, it's no use going back and deciding who
8 was right and who was wrong at this point, tribes got very used
9 to regulating themselves with very little interference from
10 anyone else and using their governmental powers to do it,
11 developing their governments to do it; and it became very
12 difficult as time went on to then start sharing power with other
13 governments. And that really wasn't the way it was meant to be.

14 I think in addition you had vague and contradictory
15 definitions of the distinction between Class II and Class III
16 gaming, and that played itself out over a long period of time and
17 tribes believed in good faith, in 1988 and for four or five years
18 thereafter 1988, until it became clarified that what they were
19 doing really was Class II gaming. It was an electronic form of
20 Class II gaming. It was -- it was way of broadening the appeal
21 of the paper game of pull-tabs and it was years later, in Ninth
22 Circuit and DC Circuit opinions that it became clear that most
23 forms, if not all forms of electronic gaming are Class III.

24 But by that time things had developed on Indian lands
25 in California to the extent that it became very difficult to put
26 the horse back in the barn. That definition is vague to this
27 day. The regulations that were then adopted and disagreements
28 over what they are. And I think it was again a little bit naive

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1 to think that by trying to define that distinction in a few words
2 without any real recognition of the immense difference between
3 electronic and paper games that underlies this dispute.

4 In addition, as some of the speakers have said, there
5 was a, there's an interplay here between state and federal law
6 which is very complicated. So that federal law is informed by
7 state law and while the tribes are subject to the federal law
8 they have to -- the federal law looks to the state law and it
9 took years to -- and we're still not out of the woods yet over
10 what that interplay is and exactly how much influence does state
11 law have on the federal law. And we're still back in the -- when
12 a remand in a Rumsey v Wilson case that was, the complaint was
13 file in 1992 on that matter.

14 And, there was an assumption, I think, that state law
15 would be static and that was probably wrong too, because state
16 law keeps changing. And, it keeps changing in reaction to what's
17 going on on Indian lands.

18 So in California all of those things happened. And
19 then California Supreme Court decisions came down which redefined
20 exactly what was lawful in California. None of us really knew
21 that until 1996.

22 One other aspect of the interplay between state and
23 federal law that's been mentioned was that while state law may
24 apply, only the United States has jurisdiction to enforce the
25 law. So where the state and the tribe really are the ones that
26 were concerned, and the parties and their policies are at stake;
27 the IGRA reads, it's the Federal Government that has exclusive
28 jurisdiction to enforce the laws.

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1 And the Federal Government, I think, was confused
2 during this period. It saw that what was happening may or may
3 not be legal. It waited until it could get clarified. By that
4 time the industry had developed quite a ways and then by the time
5 it became clear that probably most of what was going on was Class
6 III and there should be a compact, problems developed over
7 whether or not the governor would negotiate with tribes that were
8 engaged in gaming that violated state law.

9 And then, and by 1996 when the Pala compact
10 negotiations began, everyone thought they would take a few months
11 and it all would be over and everything would be resolved; we
12 know what happened. You've heard about that. And the U.S.
13 Attorneys waited during that period hoping that things would get
14 resolved. Ultimately the U.S. Attorneys decided to move, they
15 told the tribes back in 1996 in August that they would give this
16 Pala process a chance to work and after that they were going to
17 enforce the law and that appears to be what's happening now and
18 there are Court decisions going one way or the other.

19 I think in addition looking at it now and looking at
20 possible changes to IGRA in the future that this Commission may
21 recommend, I think that there was again a lack of understanding
22 about the depth of adversarial relations between the states and
23 tribes, a lack of trust between the states and tribes. And you
24 see it expressed in this testimony. But it really again is one
25 of the most important underlying reasons for the current dispute,
26 and really the mess that we have in California right now over
27 Class III gaming.

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1 The parties have literally hundreds of years of
2 mistrust. The, you know, as Allison said in her opening summary
3 for you, the states haven't played much of a role in reservation
4 activities, very -- they played a very minor role. And yet in
5 1988 Congress mandated agreements between the state and the
6 tribes, and expected that these agreements would suddenly be in
7 place. And it just wasn't going to happen that easily. There's
8 a traditional notion or zone of sovereignty the tribes have
9 become accustomed to.

10 From my point of view and my client's point of view,
11 they probably have a different notion of what sovereignty is now.
12 Sovereignty in their view doesn't necessarily mean exclusive
13 jurisdiction or we draw a line in the sand and you don't come
14 over it. If you come on our side you've interfered with our
15 sovereignty.

16 I think that Pala and other tribes that I represent
17 have determined that in an era when tribes have begun to interact
18 with other non-reservation governments and people and clearly
19 have off-reservation impacts because of their on-reservation
20 activities, what sovereignty requires is negotiation with those
21 other governments that represent those non-reservation
22 constituencies and reaching agreements and accommodations that
23 allow those other governments to protect their interests but
24 maintain the tribes' interests and allow the tribes to protect
25 their interests.

26 And certainly in this field and we're talking about
27 gaming, I think that Pala feels that their interest is to ensure
28 that they have a profitable gaming operation, that the state does

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1 not interfere with their internal relations. But they have no
2 problem guaranteeing protections to patrons, to employees, to --
3 including the right of workers to collectively bargain if they
4 choose. That was just never really an issue for Pala.

5 And extending that right that people have on non-
6 Indian lands to Indian lands was not seen as a threat to their
7 sovereignty. Dealing with unions is something that governments
8 do all the time. County governments do it. State governments to
9 do it. The Federal Government does it and the gaming industry,
10 it's the standard. So it never was really a major issue but
11 obviously it's become a major issue for other tribes.

12 Another thing that the -- another aspect of IGRA that
13 the California experience has highlighted is that it doesn't say
14 who negotiates the compacts. It just says the state negotiates
15 the compacts. It hardly ever expect in one, irrelevant to this
16 discussion, phrase uses the word governor. And that problem has
17 occurred not only California but in Kansas and New Mexico and
18 other places. And in California it's an ongoing dispute. As
19 Chairman Tucker indicated there is a Superior Court decision that
20 recently came down saying that the Pala compact can't be
21 effective unless and until it's ratified by the state
22 legislature. That the governor did not have authority or doesn't
23 have authority to actually make the compact effective as a matter
24 of state law unless the legislature acts.

25 Well, Pala has sponsored legislation and there is
26 legislation pending right now in the California legislature to do
27 just that. And the legislature goes out of session, I think, for

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1 the year at the end of August so we're certainly going to know by
2 then whether or not a compact has been ratified.

3 I think from Pala's point of view, it just doesn't --
4 it's smacks of bad faith for some tribes to argue that the
5 compact can't be effective until it's ratified by the legislature
6 and then use all their efforts to block the ratification of the
7 compact in the legislature.

8 Pala doesn't really mind whether other tribes enter
9 into compacts, that's their sovereign right. But Pala certainly
10 is offended as you heard from the chairman that other tribes are
11 saying that it did the wrong thing or that its compact is no good
12 or it was a back room deal or it was influenced by outsiders,
13 when from Pala's point of view they did exactly what they wanted,
14 they did it in a responsible manner and they did it in a way that
15 they can hold their heads high.

16 Let me just for a moment respond to a couple of
17 points that were raised.

18 On the lottery machines themselves, I think it's true
19 that California law prohibits slots machines. And we took that
20 as a given, that it prohibits slot machines. The way the compact
21 reads, if it's determined in fact in Rumsey versus Wilson that
22 the state lottery is allowed to operate slot machines then the
23 tribe would be able to have slot machines.

24 On the other hand that hasn't been determined yet,
25 the Ninth Circuit seemed to indicate that that was probably not
26 the case. So we operated under that assumption with the
27 understanding that if an assumption is wrong the tribe would
28 benefit. And that decision is probably going to come down in a

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1 matter of weeks. There's motions on summary judgments that are
2 pending, and the case has been taken under submission.

3 But in any case the new devices while they clearly
4 operate on lottery principles, they are not banked and nothing
5 that the player does that activates some element of chance
6 results in a winner. From a players perspective they are not
7 going to be all that different. They are going to be competitive
8 and they are going be functionally similar, and it's unlikely
9 that the player will see much difference.

10 And that was very important. That was the most
11 important thing to Pala that these machines can pick winners up
12 to four times a second and that they will be there in sufficient
13 numbers for the tribe to make money. There is a limit of 975,
14 but, only four of 40 tribes that are now operating have more than
15 that right now and the statewide cap of 19,900 increases the
16 number of machines on Indian land today by almost 50 percent.

17 And in addition, gaming tribes under the new compacts
18 that were negotiated have a transition period to transition from
19 their current gaming devices into the lottery devices and that
20 transition period extends beyond March 1st, 1999, at which date
21 under the Pala compact those numbers are renegotiated.

22 I see my time is up. I have a number of other issues
23 but I -- if anyone is still interested in the tax issue, we can
24 talk about that some more during the question period as to why my
25 other clients didn't enter into this compact, I'd be happy to
26 address those issues if anyone is interested.

27 But, thank you very much.

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1 CHAIRPERSON JAMES: No, thank you. And thank you to
2 all of our panelists.

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