

1 CHAIRPERSON JAMES: At this point I'd like to open it
2 up to commissioners. Commissioner Wilhelm.

3 COMMISSIONER WILHELM: Chairman Tucker, as you know
4 in yesterday's Indian Gaming Subcommittee of this Commission
5 there was a tremendous amount of very useful information that you
6 and others presented and if I may I'd like to, for purposes of
7 putting a few -- just a few of those facts into the record of
8 this Commission meeting today, I'd like to ask if you could
9 confirm a couple of pieces of data that were testified to
10 yesterday.

11 First, there was testimony presented by the economic
12 study that some of the tribes had commissioned about the very
13 positive impact on the unemployment rate on many of the
14 reservations that your development of gaming has had. The
15 statistic said that on the non-gaming reservations the
16 unemployment rate for Native Americans on those reservations was
17 in excess of 60 percent. That amongst the gaming tribes prior to
18 gaming, the unemployment rate was in excess of 50 percent but
19 since the development of gaming on those reservations that at
20 least by last year the unemployment rate had been reduced at
21 least to 27 percent, in other words, cut nearly in half.

22 Can you confirm those figures?

23 MR. TUCKER: According to our economic study, yes,
24 that is correct.

25 COMMISSIONER WILHELM: Which I think you and others
26 obviously expressed the determination to further improve that but
27 that is obviously tremendous progress and I think it speaks

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1 extremely well of what the gaming tribes have done in terms of
2 addressing the unemployment issue amongst Native Americans.

3 There was also testimony that -- a great deal of
4 other testimony which I won't try to repeat, some of which also
5 occurred today about other positive uses that gaming revenue has
6 been used for by the tribes but I'm speaking now about
7 specifically jobs. There was also testimony that presently
8 there are about 15,000 jobs involved in the tribal casinos in the
9 state of California. Is that correct?

10 MR. TUCKER: That is correct.

11 COMMISSION WILHELM: And there was also some
12 testimony, in particular from the Pechanja tribe that indicated
13 that the tribes have made tremendous progress in terms of making
14 management jobs available to members of the tribe and in the
15 Pajunga case I believe the statistic was that about 65 percent of
16 the management jobs were held by members of the tribe.

17 And then finally there was testimony if you recall
18 from at least two tribal chairs to the effect that many of the
19 members of their particular tribes were less interested in the,
20 if I might use the term, the rank and file service jobs, I think
21 the phrase that one of the tribal chairs used was, were less
22 interested in putting an apron on and doing that kind of kitchen
23 work, for example, and more interested in other kinds of
24 employment; management, construction, and so forth.

25 And, in connection with that, the testimony -- and
26 this is the last thing that I would ask you to confirm if you
27 can, the testimony was that for non-management jobs in the
28 casinos, the tribal casinos in the state of California, that 95

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1 percent or more of those non-management jobs are held by people
2 who are not members of the tribes, people who in other words are
3 Latinos and Anglos and Asians and all of the other people who
4 work in the gaming and hospitality industry throughout the state.

5 Is that accurate?

6 MR. TUCKER: That's accurate to the point that anyone
7 who works in this type of business they're going to do the best
8 they can and they hire the best people they can for any
9 particular job.

10 COMMISSIONER WILHELM: Sure.

11 MR. TUCKER: And whether it's a non-Indian, Native
12 American, or Hispanic or Asian; whoever is best for that job,
13 they're the ones who are going to be hired.

14 COMMISSIONER WILHELM: And in fact 95 percent of non-
15 management jobs are held by people who are not members of the
16 tribes.

17 Thank you very much.

18 CHAIRPERSON JAMES: Commissioner Loescher.

19 COMMISSIONER LOESCHER: All right, yes.

20 (Applause.)

21 COMMISSIONER LOESCHER: Madam Chairman, I have
22 several questions I'd like to ask Mr. Kolkey if I could.

23 You know the state of California is involved in the
24 lottery, involved in horse racing, involved in all kinds of forms
25 of gambling that not only the people of California are involved
26 with but they have relationship with the Nevada people and other
27 people are involved with your gaming and plus Indian tribes.
28 Also it seems like the State of California is a competitor in

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1 addition to all these other organizations that are running gaming
2 in California.

3 You're not the Attorney General and I've asked
4 attorneys general in other states this question. What would be
5 the State of California's position or your governor's position
6 with regard the possibility that the Federal Government under the
7 interstate commerce clause would move aggressively to regular
8 gaming in the state of California?

9 MR. KOLKEY: Well I think that Governor Wilson's own
10 view is that he has concerns over the expansion of gaming in the
11 state. And he believes it's a matter that ought to be addressed
12 at the state level. The state ought to be able to assess what
13 type of gaming is available in the state and an ancillary of that
14 would be that the state then ought to be the one that is
15 regulating that gaming.

16 So, if it became a matter of federal jurisdiction, it
17 would seem to me, soon to be a case where the Federal Government
18 would take out of the state's hands the ability to shape the type
19 of gaming that was available in the state including the manner in
20 which that gaming was offered.

21 COMMISSIONER LOESCHER: Madame Chairman.

22 CHAIRPERSON JAMES: Commissioner Loescher.

23 COMMISSIONER LOESCHER: In looking at your
24 description of the Pala model compact it appears that the state
25 likes this limited licensing concept as you've described it.
26 However, it appears to limit only Indian gaming.

27 Are all of the other gaming enterprises in the state
28 also limited as to the number of games at specific locations?

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1 And also as a follow-up, what the public policy rationale for
2 discriminating against the Indian nations in this regard?

3 MR. KOLKEY: Well, first let me note that card clubs
4 in the state are subject to a vote of the people before they can
5 be established in a locality. And under a law that was passed
6 last year, a card club in the state cannot even expand by 25
7 percent or more without a vote of the local jurisdiction.

8 There is no limit that I know of as to the number of
9 tables that a card room can have other than it's going to have to
10 expand the facility to hold the tables. If it expands the
11 facility to a great extent, it now must get a vote of the people
12 of the locality in order to do it.

13 With respect to the lottery gaming and the licensing
14 program, as I mentioned in my testimony the balance that the
15 governor was trying to achieve here was the fact that the people
16 of the state had in 1984 said as a matter of the California
17 Constitution there were not to be casinos of the type operating
18 in Nevada and New Jersey in the state. And there were no gaming
19 facilities established legally in the state that had rows and
20 rows of gaming devices. This didn't exist anywhere in the state.

21 By virtue of IGRA the state had an obligation to
22 negotiate over the establishment of such gaming facilities that
23 had never existed before. But because the federal law required
24 the governor to do something that the people of the state had not
25 approved, they had not approved the nature of this gaming
26 operation with facilities full of machines, he felt an obligation
27 within the constraints of federal law to provide some restraint
28 on the proliferation of the number of gaming facilities that grew

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1 up in the state without the people of the state having approved
2 of this new gaming facility.

3 Now, in some states where you might have three
4 tribes, perhaps establishing a gaming facility doesn't puncture a
5 huge hole in the state's public policy vis-a-vis gaming. But in
6 a state that has some 100 tribes, one can see the potential of
7 having gaming facilities established between 40 to 60 to 70
8 tribes in 70 different locations could quite change the face of
9 gaming operations in the state.

10 And, thus, the balance that was achieved through the
11 Pala compact was to say we will give tribes that can earn from
12 the gaming who are situated in locations to earn from the gaming
13 the right to have these gaming facilities as federal law appears
14 to require but we're going to discourage the proliferation by
15 providing this licensing system which is, as I said, also has the
16 advantage of allowing all tribes in the state even those who by
17 accidental location couldn't possibly open a gaming facility to
18 benefit from the gaming.

19 Because after all the purpose of IGRA is not to try
20 and make expert gaming operations on tribal reservations so much
21 as to provide for tribal economic development and tribal self-
22 sufficiency.

23 And the governor's compact is the first one in the
24 nation, that I'm aware of, that tries to honor IGRA's purposes of
25 benefiting tribal economic development by allowing all tribes in
26 the state to share in it, not the few that happen to be in
27 locations that enable them to benefit from the gaming.

28 So --

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1 COMMISSIONER LOESCHER: Madam Chairman?

2 CHAIRPERSON JAMES: Mr. Loescher.

3 COMMISSIONER LOESCHER: The question is will the
4 state limit its own activities: lottery and video gaming, you
5 have the same rights as the Indian tribes under the terms of
6 agreement as I've seen it to add additional machines and
7 equipment into the open market managed by the state.

8 Is the state going to limit itself similarly?

9 MR. KOLKEY: The state lottery has limited itself.
10 The State Lottery Commission does not have any interest that I'm
11 aware of in establishing any type of gaming facility and indeed
12 we worked hard with Pala Band to come up with a machine that was
13 not only legal but one that was not being used by the State
14 Lottery which in essence gives the tribes a quasi monopoly on
15 that form of gaming without which quasi monopoly the tribes
16 presumably would not be able to benefit.

17 COMMISSIONER LOESCHER: Madam Chairman, it's sort of
18 a paradox yesterday we, in the hearing with our committee that we
19 held yesterday that we heard Indian tribes come forth and say
20 that the Governor Wilson does not negotiate in good faith,
21 doesn't answer his mail, asking -- when the Indian tribes ask to
22 negotiate with the governor as IGRA outlines, and that the
23 reasoning is, is that, that the governor won't negotiate with
24 Indian tribes because he feels that they are running criminal
25 activities in running their casinos as they are now.

26 It's sort of a paradox and kind of a difficulty that
27 Indian tribes have, they can't get to first base to the table to
28 negotiate. And I'm wondering that you have made the claim that

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1 IGRA needs to be amended because tribes are not obligated to
2 negotiate in good faith, yet the governor creates his own paradox
3 so he doesn't appear to be negotiating in good faith.

4 All of this seems to be somewhat disingenuous given
5 that, one, by your own word states have had an absolute veto over
6 Class III gaming compacts, without state consent there is no
7 Class III compact. And, two, up to this time tribes have no
8 remedy against states who refuse to negotiate Class III compacts
9 in good faith because of the Seminole case, tribes cannot sue
10 states.

11 Isn't it the case that the tribes' only current
12 remedy is this Spokane case where a federal court did not permit
13 a federal injunction where a state may have acted in bad faith?

14 MR. KOLKEY: Well, I don't consider the Spokane case
15 to be a remedy. Spokane simply said as a matter of equities it
16 wasn't going to allow the U.S. to enjoin an illegal gaming
17 operation where the state had raised the Eleventh Amendment to
18 bar suit.

19 I ought to make a couple of points that I tried to
20 make, perhaps unsuccessfully, my testimony. Number one, is the
21 governor had been negotiating with a variety of tribes including
22 a joint session with 16 tribes in '91 and '92. And as I
23 mentioned there was a dispute over whether or not the governor
24 had to negotiate and permit games that were prohibited under
25 state law. While that matter was being litigated by agreement,
26 tribes began to engage in un-compacted gaming in violation of
27 IGRA.

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1 And, thus, the first shot to the extent that's worth
2 anything was by tribes that decided not to comply with IGRA. Now
3 this was at a time when IGRA gave them the right to sue for bad
4 faith suits, the Seminole decision had not come out, and if they
5 thought the state was negotiating in bad faith they could have
6 brought a bad faith suit. They didn't. They simply started to
7 game. Not only did they start to game without a compact, without
8 regulation, without state law protections to workers and patrons
9 and neighborhoods; but they began to operate the very devices
10 that were under dispute in the litigation.

11 Once a number of tribes had begun those unlawful
12 operations, and I should note that the majority of tribes in the
13 state are law abiding, but once a minority of tribes had begun to
14 violate federal law and operate unlawful gaming, there was much
15 less incentive for those tribes to negotiate restrictions that
16 would restrict their activities to legal ones subject to
17 regulation by the state.

18 In other words as long as you can engage in illegal
19 gaming until you conclude a compact, there is little incentive to
20 conclude a compact that limits you to legal gaming unless, of
21 course, the U.S. says, "Enough is enough, you've got to shut down
22 your unlawful operations". But those operations did create a
23 huge hole in the state's public policy with respect gaming and it
24 was a hole that's not authorized by IGRA. IGRA doesn't authorize
25 Class III gaming without a compact or with respect to games that
26 are not permissible under state law.

27 We, therefore, submit that the governor negotiated,
28 he acted in good faith, certain number of tribes began to operate

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1 outside of the law and after that, negotiations were terminated
2 but the governor then continued to negotiate with tribes that
3 were law abiding. I put in 500 hours of my own time in
4 negotiating the Pala compact and spent endless hours negotiating
5 with other tribes such that we now have eight compacts that have
6 been concluded with tribes that want to operate legal gaming
7 operations.

8 And, finally, to the -- to the point that the tribes
9 don't have a remedy; the state has said any tribe that wants to
10 enter a Pala like compact, based on that compact, even though
11 it's engaged in illegal gaming can do so and we'll provide a
12 transition period wherein they can transition their current
13 operations to legal ones without any disruption at all in their
14 operations.

15 Alternately, if they want to negotiate a different
16 compact, if they -- and their unlawful gaming and comply with
17 IGRA; the state will not only negotiate with them but the state
18 will waive its 11th Amendment immunity to a bad faith suit if the
19 tribes believe that it has negotiated in bad faith. So we've
20 given the tribes the remedy under IGRA before the Seminole case.

21 COMMISSIONER LOESCHER: Madam Chairman, just one last
22 thing.

23 CHAIRPERSON JAMES: One last thing, Mr. Loescher.

24 COMMISSIONER LOESCHER: Madam Chairman, the inherent
25 rights of one government, you know, and the rights of other
26 governments, inherent rights, very complex piece of business,
27 very, very complex. And I was reading this Pala agreement that
28 the governor has and one of the things that I wondered about

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1 based upon my own personal experience, business experience, is
2 that arbitration is probably the worst form of dispute resolution
3 anybody could have ever dreamed. It splits the baby approach and
4 avoids interpretation of law, especially complex issues such as
5 you are facing between government to government and then the
6 issues within gaming.

7 I'm wondering -- and additionally arbitration kind of
8 moves towards settling damage, financial damage questions rather
9 than dealing with interpretations of law and issues. But I'm
10 wondering in this process of negotiation whether or not the state
11 of California might be taking advantage of Indian tribes and
12 their tribal members by offering this form of dispute resolution
13 rather than utilizing the mechanism of the Federal Court as a
14 venue for disputes between governments and governments.

15 MR. KOLKEY: All right, well that's a very good
16 question. The fact of the matter is, is that the state would
17 have preferred the Federal Courts or the State Courts. The
18 problem was the Federal Courts had limited jurisdiction. We
19 weren't sure as to what jurisdiction it could take over what was
20 in essence a breach of compact dispute, in essence a contract
21 dispute.

22 And also the tribes preferred a more neutral remedy.
23 For instance in international law, parties often resort in
24 commercial matters to arbitration as a way of not subjecting
25 either party to the other party's court system. And so we
26 agreed, frankly in respect to the tribes' sovereignty rather than
27 seeking the state court system and because of uncertainty as to
28 the federal jurisdiction, and the Federal Court system to resolve

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1 many of the disputes through arbitration which would be resolved
2 through a neutral.

3 My experience with arbitration has been more with
4 commercial matters than others, but my experience is that
5 commercial arbitrators often do not split the baby. They are
6 diligent, they attempt to apply the facts to the legal standards
7 that the parties have presented to them and it can be a much more
8 expeditious way of resolving a dispute, particularly a fact
9 intensive dispute where it's going to be the facts more than the
10 law that determine the outcome than litigation. And here what we
11 will have here are in essence contract claims being arbitrated by
12 a neutral in neither party's courts and they will often be fact
13 laden disputes with respect to whether or not a particular
14 provision in the agreement has been breeched, which provision by
15 the way will have had no case authority for the courts to rely on
16 in interpreting it and thus it's an appropriate matter to be
17 arbitrated and as I say it respects the tribe's sovereignty and
18 it was a way that avoided the problems with federal jurisdiction.
19 So it was no way done to impair the tribes' remedies. Indeed it
20 was done out of respect for the tribe's sovereignty.

21 CHAIRPERSON JAMES: Thank you.

22 MR. DICKSTEIN: Let me just add to this, if I may. I
23 think Pala insisted on the arbitration. Federal courts are
24 courts of limited jurisdiction as you know. Virtually every
25 dispute that's being submitted to arbitration, the Federal Courts
26 wouldn't have jurisdiction over. The state wouldn't go into
27 tribal court and the tribe wouldn't go into state court, so
28 arbitration seemed a reasonable alternative. In addition the

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1 tribe has more control that way over who the decision maker is
2 because we adopted rules that allow the tribe to eliminate
3 decision makers or judges that the tribe might feel have some
4 kind of bias and that would be much more difficult in a state
5 court forum. It's less formal. It's quicker. It only can be
6 enforced in courts of competent jurisdiction. And it seemed the
7 best alternative among those that are available considering the
8 federal courts don't have jurisdiction.

9 Moreover, in areas where federal courts do have
10 jurisdiction, for example, disputes over whether the tribe was
11 engaged in unlawful Class III gaming beyond the scope of the
12 compact, those do go to federal court if you read the compact
13 closely. So we carefully looked to take disputes to federal
14 court where the federal court had jurisdiction and when it didn't
15 have jurisdiction we chose arbitration over state courts.

16 COMMISSIONER LOESCHER: Madam Chairman, may just have
17 a moment to speak.

18 CHAIRPERSON JAMES: Excuse me just a minute.

19 COMMISSIONER LOESCHER: Sure.

20 CHAIRPERSON JAMES: I need to recognize Commissioner
21 Bible and then we'll come right back to you.

22 COMMISSIONER LOESCHER: Thank you.

23 CHAIRPERSON JAMES: Commissioner Bible.

24 COMMISSIONER BIBLE: Question for Mr. Kolkey is, it's
25 apparently your day today to get all the questions.

26 As I've listened to the testimony today and we're now
27 apparently hearing a great deal about the dispute down here in
28 the state of California, it seems to me that the culprit really

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1 is the Federal Government and the Federal Government's failure to
2 enforce IGRA, to step in and enforce the law as it was written.

3 Am I incorrect in that assumption and if I am
4 incorrect I'd appreciate if you'd let me know and if I am correct
5 why would you -- why would you think that the Federal Government
6 failed to enforce the law timely?

7 MR. KOLKEY: Well, I don't know if I can fully answer
8 that question because I'm not privy to the Federal Government's
9 thinking on this. Certainly had there been enforcement the
10 moment that the tribal facilities were established for un-
11 compacted gaming and the matter nipped in the bud, the tribes
12 wouldn't have put the investment into the facilities that they
13 have.

14 On the other hand, as I understand it and I'm going
15 to try and simply present the Federal Government's position as
16 best as I understand it; their view was that they wanted to be
17 very careful with respect to immediately enjoining tribal
18 operations if the matter could be resolved and as I understand it
19 the tribes went to the Federal Government and said this Rumsey
20 case, the case the Ninth Circuit ultimately reversed the District
21 Court and held that the state had no obligation to negotiate over
22 games unless they were permissible under state law, the tribes
23 said while that case was pending that the Federal Government
24 should wait until the law became more clear and then when the
25 Ninth Circuit ruled the tribes asked if the Federal Government
26 would wait until they applied for a re-hearing on bond, and the
27 Federal Government said all right, we'll wait.

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1 But it was done at the request of the tribes because
2 the tribes felt that they might be able to get a better legal
3 ruling than they ultimately did.

4 Finally when they didn't, the Federal Government said
5 all right, you know, you've got stop the un-compacted gaming. The
6 tribes asked for more time because of the Pala compact
7 negotiations and the Federal Government simply was trying to give
8 the tribes every benefit of the doubt to resolve this but finally
9 when it wasn't resolved and the un-compacted gaming continued,
10 they put their foot down which is the reason for the current
11 enforcement actions.

12 CHAIRPERSON JAMES: Thank you. Mr. Tucker, did you
13 want to --

14 MR. TUCKER: Yeah --

15 CHAIRPERSON JAMES: -- add something?

16 MR. TUCKER: -- just to add two comments here.

17 MR. FOREMAN: Mr. Kolkey --

18 CHAIRPERSON JAMES: Would you identify yourself for
19 the benefit of the Commissioners?

20 MR. FOREMAN: My, my, is this on?

21 CHAIRPERSON JAMES: Yes it is.

22 MR. FOREMAN: My name is George Foreman. I'm with
23 the firm of Foreman and Prohaska (ph), and we represent a number
24 of gaming and non-gaming tribes and have been asked to be here by
25 the California Nations Indian Gaming Association in connection
26 with Mr. Tucker's testimony.

27 The Commission has heard a number of statements that
28 I think are not complete and thus to some extent inaccurate.

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1 What the Commission should know is that Governor Wilson vetoed
2 three bills, 1993, 1994, and 1997 that would have given him the
3 authority to sign compacts and bind the state to compacts with
4 tribes. He is now supporting a bill because he has a compact
5 that he likes.

6 Second, the people did not vote on the expansion of
7 race tracks or the placement of race tracks. The California
8 State Lottery is not under any statutory limitation as to the
9 number of electronic terminals it can use. It has more than
10 19,000 statewide and is entirely market-driven. They have a
11 ratio of machines to potential customers, that's how their
12 numbers are determined.

13 The -- you have to be 18 to play the lottery in
14 California. You have to 18 to go to a race track and bet at a
15 race track in California. You have to be 21 under the Pala
16 compact to play Indian lottery games.

17 The state between 1994 and 1997 was sued by three
18 tribes that were not engaged in any form of gaming and with whom
19 the governor refused to negotiate and in each of those cases the
20 state asserted and obtained the dismissal of that action under
21 the 11th Amendment, Sovereign Immunity.

22 The state has not executed any valid waivers of its
23 sovereign immunity under the 11th Amendment, under the United
24 States Supreme Court's decisions. It takes an act of legislature
25 to authorize the governor to waive the state's sovereign
26 immunity. Legislature has not done that, indeed the pending Pala
27 compact ratification bills contains a provision that would give
28 the governor the authority to waive the state sovereign immunity.

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1 As it is now under current state sovereign immunity law the state
2 could at any point in these proceedings assert its sovereign
3 immunity, including for the first time on appeal.

4 As far as arbitration goes, in a couple of respects
5 under the Pala compact, the arbitrator can write the agreement
6 between the parties including in the collective bargaining
7 provisions where there is mandatory binding interest arbitration
8 as to any unresolved dispute at the end of 120 days during which
9 time, of course, the tribe is under a complete gag rule. It
10 cannot say anything in that organizing campaign even to, to
11 inform its employees that a prospective labor organization is
12 under federal trusteeship or has been identified as infiltrated
13 by organized crime or anything like that.

14 And that's one of the issues the tribes have with
15 this agreement. It's not -- tribes don't have quarrels with the
16 labor movement. Tribes and labor are natural allies. We have
17 many things in common.

18 What tribes have a problem with is the state
19 dictating to the tribe as a sovereign government what that
20 tribe's labor policies or work policies should be. So, and in
21 response to Mr. -- Commissioner Dobson's question on taxation,
22 the California -- the state of California does not pay any
23 federal income taxes on the proceeds of the California State
24 Lottery because the state of California is a government. Tribes,
25 as a matter of federal law, do not -- are not obligated to pay
26 income taxes. Tribes as employers pay all federal employment
27 taxes.

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1 The state of California takes the position that
2 tribes are obligated to pay, collect, and remit state use taxes
3 on sales to non-Indians on their lands.

4 COMMISSIONER DOBSON: Sir, that's the first straight
5 answer I got to that question and if that's the case --

6 (Applause.)

7 COMMISSIONER DOBSON: -- it really ought to be stated
8 and people really ought to understand exactly what the taxation
9 is and not call it the myth of non-taxation.

10 MR. FOREMAN: And one final point and that is that
11 the Commission has received I think an overall very good
12 background paper from its staff but I saw it for the first time
13 this morning as did some other tribal attorneys and there are
14 some significant, I think, errors and omissions and
15 misunderstandings and misstatements in that document that we
16 would appreciate the opportunity to correct.

17 For example, in California state criminal laws do
18 apply on Indian lands. State gambling laws are applied as a
19 matter of federal law, that's correct but if somebody commits a
20 crime of theft or cheating or violence on an Indian reservation
21 in California, federal law allows state law enforcement officers
22 to enter those lands and enforce state criminal laws.

23 CHAIRPERSON JAMES: Let me interject here and just
24 say that we would happy to receive any edits or comments that
25 you'd like to make on that and we'll make sure that all the
26 Commissioners receive those. I want to get to Commissioner
27 McCarthy, we're running about 20 minutes over at this point but
28 he's been very patient.

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1 COMMISSIONER McCARTHY: No actually I've enjoyed this
2 panel very much. I think it's been very informative.

3 Mr. Kolkey, you've articulated the ambiguities in the
4 federal law and what it boils down to, I think, is that Congress
5 has to make a decision either to allow sovereign tribes to have
6 whatever form of gambling they want or to recognize that they
7 will be limited to what is permitted in each individual state.

8 It's one way or the other, and the law was written
9 with contradictions and so that a lot of problems, I think, have
10 been produced. That's a judgment Congress has to make, hopefully
11 soon instead of waiting for the courts to drag this out in many
12 different forums over the next decade.

13 I have some specific questions I want to put to you
14 and fairly simple ones, very quickly regarding the Pala compact
15 because if it survives, if it's not reversed by Proposition 5 and
16 it survives any court challenges, it's obviously going to be
17 copied in some different places. So there's some questions I
18 need to ask about it in that potential eventuality.

19 One, how many outlets might tribally run lottery
20 have? Are they limited any way? The state has 19,000 merchants,
21 outlets that -- somebody answer the phone.

22 (Laughter.)

23 COMMISSIONER McCARTHY: That they have. What would,
24 to make tribal managed lotteries viable, what could they look to
25 for outlets to try to sell tickets? Does the compact speak to
26 that in any form?

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1 MR. KOLKEY: Well, what the compact does is it simply
2 provides that the tribe can operate legal Class III gaming on its
3 reservation in a location or locations --

4 COMMISSIONER McCARTHY: Right.

5 MR. KOLKEY: -- but it would be on the reservation
6 because that's what IGRA provides is the operation of gaming on
7 the reservation. No one is limiting the location of the Class
8 III gaming to a single place. It could be in more than one --

9 COMMISSIONER McCARTHY: You said Class III gaming?

10 MR. KOLKEY: Right. Right.

11 COMMISSIONER McCARTHY: Yeah.

12 MR. KOLKEY: In other words the casino style gaming.

13 COMMISSIONER McCARTHY: Right.

14 MR. KOLKEY: Because Class II, the state has no role
15 in and Class I, clearly is simply up to the tribe. So the
16 state's only involved in Class III, the non-bank card games are
17 Class II and a tribe can conduct those without any state
18 involvement.

19 So, Class III is what the Pala compact addresses and
20 they can have more than one location but I think the economics of
21 the matter are that the tribe probably needs to have a location
22 with a number of machines rather than scattering the lottery
23 terminals.

24 COMMISSIONER McCARTHY: Okay, let me see if I
25 understand you correctly. If the particular tribe managing a
26 lottery wants to have merchants off the reservation, they are not
27 allowed to do that?

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1 MR. KOLKEY: IGRA only provides for the gaming on the
2 tribal reservation and, therefore, it's not something that we
3 even discussed in the course of compact negotiations.

4 COMMISSIONER McCARTHY: Well the difference between
5 having 100 outlets and having 19,000 outlets is quite a
6 difference. It directly goes to the ultimate success of the
7 lottery. So I think what I hear you saying is that to have more
8 than 100 outlets for lottery ticket sales, they would have to
9 amend IGRA in some fashion.

10 MR. KOLKEY: Well, they would have to amend IGRA if
11 we were going to provide for sales off the reservation.

12 COMMISSIONER McCARTHY: Well, I'm saying --

13 MR. KOLKEY: Right.

14 COMMISSIONER McCARTHY: -- does your -- what I heard
15 you answer was that the compact itself between the state of
16 California and the Pala tribe does not prohibit sales off the
17 reservation, it's the federal law that does, it's IGRA that does.
18 Correct? The state is not taking a position that the tribe would
19 under the compact allowed to run a lottery should be sell -- be
20 allowed to sell tickets off the reservation. That's a federal
21 prohibition.

22 MR. KOLKEY: Federal law limited the gaming to the
23 tribal lands.

24 COMMISSIONER McCARTHY: I understand.

25 MR. KOLKEY: And, but I should note that the compact
26 in line with that only authorizes Class III gaming on the
27 reservation.

28 COMMISSIONER McCARTHY: I got it.

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1 MR. KOLKEY: Okay.

2 COMMISSIONER McCARTHY: A separate state law
3 prohibits, would prohibit the tribe from selling lottery tickets
4 --

5 MR. KOLKEY: Yes, yes.

6 COMMISSIONER McCARTHY: -- off the reservation.

7 MR. KOLKEY: Well --

8 COMMISSIONER McCARTHY: Separate state law or --
9 enforcement of the federal law?

10 MR. KOLKEY: No, the state penal code prohibits
11 anyone in the state from operating a lottery except for the state
12 lottery. The state lottery is the exception to the general
13 prohibition under state law to operating a lottery. So the only
14 place that a tribe can operate a lottery legally is on the
15 reservation but federal law only addresses the operation of Class
16 III gaming on the reservation.

17 Federal law preempts state law. So if federal were
18 change that would preempt any state law to the contrary.

19 COMMISSIONER McCARTHY: Okay. You're not saying that
20 the governor or the state of California is posing an obstacle to
21 any tribes under a compact which want to manage a lottery
22 operation? There is a penal code section that right now is
23 applicable.

24 MR. KOLKEY: Yes. Penal code prohibits anyone in
25 California from operating a lottery except for the state lottery.

26 COMMISSIONER McCARTHY: Right. But is it the
27 position of the governor that that should be changed in order to

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1 allow any tribes permitted to run lottery operations to be more
2 viable?

3 MR. KOLKEY: The governor hasn't made any proposals
4 of that nature. We've taken federal law as it is, state law --

5 COMMISSIONER MCCARTHY: Okay.

6 MR. KOLKEY: -- as it is and then negotiated --

7 COMMISSIONER MCCARTHY: All right. I think I
8 understand your answer.

9 Let me move to the second point. I don't understand
10 the machines that are going to be invented to permit this lottery
11 operation and that's not -- I just don't understand. First of
12 all I'm technically deprived. I don't understand who is going to
13 manufacture the machines that the tribes would use? It's been --
14 I've been told that they are akin to the state lottery terminals.
15 Are they the same? Would they be different? Who is going to
16 invent them and within what time period?

17 MR. KOLKEY: All right. What -- I'm going to give my
18 answer and then I'm going to have Mr. Dickstein answer the rest
19 because he can fill in some gaps.

20 From the state's perspective we were under the law
21 allowing a tribe to operate any legal lottery game. Whether it
22 has been invented or not, the tribe could operate any legally
23 permissible game. What games the tribe offered were up to the
24 tribe. The tribe would then find the game or have it developed
25 and make the arrangements for the development of the game.

26 The state's concern was simply that it was legal and
27 what we did in the compact is because the tribes understandably
28 did not want to operate the same games the state lottery did

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1 because of the competition and the state lottery games are in
2 more convenient locations; the tribes wanted lottery games that
3 were not available under the state lottery.

4 So, to get them started we spent some months
5 negotiating a lottery game that the tribe wanted to play and the
6 state believed would be legal.

7 MR. McCARTHY: Could you please just send us the
8 description of those games. We don't need to drag this point
9 out.

10 MR. KOLKEY: Okay.

11 MR. McCARTHY: We need to understand --

12 CHAIRPERSON JAMES: Thank you.

13 MR. McCARTHY: -- what kind of games we're talking.

14 MR. KOLKEY: Okay. Well here's how the games
15 operate, generally speaking because they're described in the Pala
16 compact.

17 These games which are not the only ones they can
18 play, but the games described in the compact provide that there
19 will be a video machine ultimately where someone puts something
20 of value in the machine, it operates and it selects symbols or
21 numbers, but they get some sort of winning combination and there
22 is then a draw by another computer and the draw will be shown on
23 a score board and if their ticket matches what's on the score
24 board then they've won that particular lottery draw.

25 The game is going to be very fast moving. The state
26 lottery has a game that announces a winner every five minutes.
27 Technology allows you to have draws almost continuously. It's
28 legal as long as it's not a slot machine and it's not a slot

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1 machine because a slot machine has to have the entire operation
2 within the single machine.

3 COMMISSIONER McCARTHY: Let me just close this point
4 by saying we are looking at state run lotteries around the
5 country. We notice a trend in several states to start to induce
6 more ticket purchases to start moving towards what are described
7 casino like --

8 MR. KOLKEY: Uh-huh, uh-huh.

9 COMMISSIONER McCARTHY: -- slot machine operations.
10 I'm trying to find out in this line of questioning now --

11 MR. KOLKEY: Right.

12 COMMISSIONER McCARTHY: -- whether that's what we're
13 heading towards, whether, you know, it's by the state of
14 California or whether it's by any, any tribes under compact
15 operating lotteries --

16 MR. KOLKEY: Right.

17 COMMISSIONER McCARTHY: -- because one of the things
18 this Commission is looking at is the impact of state run
19 lotteries --

20 MR. KOLKEY: Right.

21 COMMISSIONER McCARTHY: -- on the gambling culture of
22 the nation as well

23 MR. KOLKEY: Okay.

24 COMMISSIONER McCARTHY: That's why I'm asking this
25 question.

26 MR. KOLKEY: And I think it's a good question because
27 I think the fact of the matter of is, is that the technology of

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1 the lottery industry will take you away from the traditional
2 forms of lottery games --

3 COMMISSIONER McCARTHY: Right.

4 MR. KOLKEY: -- where you get a ticket and a week
5 later you find out whether you've won, to games that have that
6 atmosphere of casino because they are fast moving and the player
7 is putting money into the machine at a fast rate. And, we
8 believed that given IGRA we could not negotiate in good faith
9 without allowing the tribe to engage in any legally permissible
10 lottery game. But the technology will allow a game that gets
11 closer and closer to what you see in a casino.

12 CHAIRPERSON JAMES: Well, this is a fascinating line
13 of questioning. Unfortunately I'm going to have to bring it to
14 an end. We are scheduled at this point to take out lunch break.
15 I want to thank our panelists. Thank you for your patience.
16 Thank you for your information.

17 MR. TUCKER: Madam Chairman --

18 CHAIRPERSON JAMES: I --

19 MR. TUCKER: Madam Chairman?

20 CHAIRPERSON JAMES: I hear someone. Yes.

21 MR. TUCKER: This is Dan Tucker. I would just like
22 to say to the union people who are here today that Indian tribes
23 are willing to sit to talk with you. If you're voting no on
24 Proposition 5 because you think we don't respect the unions or we
25 think we don't want the unions involved in our facilities, you
26 are totally wrong. We are willing to sit down and talk with the
27 union leaders on a tribe to tribe basis. So if you're voting no
28 because you don't like gaming that's one thing but if you're no

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1 because -- if you're voting no because you don't understand that
2 we won't -- that you feel we won't talk with you then you're
3 misunderstanding the whole process.

4 CHAIRPERSON JAMES: Thank you so much. As we did at
5 our last meeting, the agenda now calls for us to go into
6 executive session for lunch. Do I have second?

7 (No audible response.)

8 CHAIRPERSON JAMES: Thank you, Commissioners. All
9 those in favor, aye.

10 (Aye.)

11 CHAIRPERSON JAMES: The executive -- we will be in
12 executive session until 2:40 when we will come back to this room
13 at that time. Thank you.

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