

**BEFORE THE NATIONAL  
GAMBLING IMPACT STUDY COMMISSION**

**TESTIMONY OF ROBERT SMITH, CHAIRMAN**

**THE PALA BAND OF MISSION INDIANS**

**July 29, 1998**

Mr. Chairman and Members of the Commission:

The Pala Band of Mission Indians ("Pala") welcomes this opportunity to address two related issues of importance to the Commission, Tribes and the people of California. First, is the compact negotiated between Pala and the Governor of California a good and fair one that benefits Pala and all Californians? Second, how does this compact compare to Proposition 5, the ballot measure slated for the November 1998 ballot that will, if passed, give Tribes the right to have slot machines on their lands?

**THE PALA COMPACT—WHY IT IS GOOD FOR PALA AND ALL CALIFORNIANS**

**A. Background to the Negotiation Process**

The Pala Compact did not rise suddenly like phoenix from the ashes. It took seventeen months to negotiate. At the beginning, most everyone understood and agreed that this process would lead to a "model" compact for others to follow. It took years before that to get the Governor to the negotiating table because he felt, rightly or wrongly, that it was not fitting for him to negotiate with any Tribe that was operating gaming devices on its land that were in violation of California law. Of course, by 1994 all the major gaming Tribes in California were operating video gaming devices that

required a compact, though when they first put them into operation on their lands it was not clear that they were anything other than class II electronic pull-tab machines that did not require a compact. But court opinions issued after Tribes had set-up these video devices on their lands, specifically that of the California Supreme Court in *Western Telcon v. California State Lottery* and that of the federal Ninth Circuit Court of Appeal in *Rumsey v. Wilson*, finally made clear that Tribes could not operate banked games of chance on their lands nor any other game that was not permitted to someone else under state law. Given these judicial opinions, the Governor agreed in August 1996 to negotiate for an acceptable electronic lottery device with a Tribe that did not then have any in operation.

Pala was chosen for this role for several reasons. We did not have a gaming operation. We were, however, interested in establishing one on our reservation and had a long-standing request into the Governor's office to negotiate a class III compact. We also, by California standards, are a large Tribe (867 members and a 12,000 acre reservation in north San Diego County) with a stable Tribal government. Finally, while not as rich as the Tribes engaged in gaming, neither were we a destitute Tribe. Pala has a 110 acre avocado orchard, a sand and gravel enterprise, a 20 acre campground that attracts 7,000 visitors a years, a charter school where the 140 students have computers in each class, a modern fire department and an active boys and girls club. For these reasons, the Governor felt we were in a good position to negotiate a compact that could serve as a model for compacts to come after, and the organization representing

California's gaming Tribes, the California Nevada Indian Gaming Association (CNIGA), agreed. So formal negotiations between Pala and the Governor began in October 1996.

Before the negotiations concluded, many Tribes that had initially endorsed our compact negotiations and had their lawyers participate in them, began to criticize the process. While all the major gaming Tribes had their lawyers associated by Pala's General Counsel, Howard Dickstein, so that they could participate fully in the negotiations, some of the Tribes pulled their lawyers out in September 1997 because they no longer could abide by the confidentiality agreement that we had entered into with the Governor at the start of the negotiations. This confidentiality agreement was made so as not to impede progress by having leaks to the media force one or both sides to harden their positions. Perhaps, because the on-going negotiations had been a factor in keeping the U.S. Attorneys at bay for many months and allowed Tribes to who had video gaming devices to keep them in operation, some felt that a pull-out would prevent the compact from being executed and continue the U.S. Attorneys abstention from filing enforcement actions. Some may have also felt that this Governor was a "lame-duck" and by avoiding a compact that looked as if it were about to happen, Tribes could get a better deal from a future governor.

Pala, however, felt the negotiations were progressing in a positive direction and that we were obligated to continue in good faith negotiations with the Governor. We did so, and in March 1998 our compact was executed and, a month later, approved by

the Secretary of the Interior.

## **B. WHAT'S GOOD ABOUT THE COMPACT**

Pala feels our compact is good for our Tribe, other Tribes who enter into substantially similar ones, and the people of California. The features that convinced our Tribal Council to approve the compact are these:

● Tribes have a virtual monopoly on video gaming devices. The compact allows for a unique Tribal video gaming device that is a lottery, not a slot machine. The California State Lottery (CSL) is, under the California Constitution, the only one who can operate a lottery. The Indian Gaming Regulatory Act (IGRA), however, permits Tribes to do whatever state law permits anyone else to do by way of gambling. In this case the “anyone else” is the CSL, which means that only Tribes and the CSL can operate a lottery. The “lottery” device agreed to by the Governor and Pala has the look and feel of a video slot machine to the player, but operates legally as a lottery that no one else besides Tribes and the CSL can operate. Significantly, the CSL has made clear that it has no intention of using fast paced video lottery games similar to the kinds of devices agreed to by the Governor and Pala.

● Tribes get an increase in video machines allowed but a limit is established for the benefit of everyone. According to the compact the total number of video lottery devices that will be permitted to operate on Indian lands for the first year is 19,900, an increase of almost 50% from the total number now in operation in California on Indian

lands. On March 1, 1999 that number can be renegotiated upward between a new governor and Tribes. Each Tribe has a base allocation right of 199 devices, but by leasing rights from other tribes a Tribe can have up to 975 machines. This is more than 33 of the 37 current gaming tribes now have, and as for those four, the total number over 975 that they have cumulatively is 1200. This temporary ceiling assures prosperity to all California Tribes and assures the people of California that Indian gaming will not turn this state into another Nevada or New Jersey.

● All Tribes will benefit from gaming, not just a few based on the accident of location. There are more than 100 federally recognized tribes in California, but less than forty engage in gaming and the majority get no benefits whatsoever from gaming. This is because most tribes are in remote rural locations and cannot attract persons from major population centers to gamble on their reservations. Pala and the Governor are of the firm belief that all tribes should benefit from gaming. Accordingly, we worked out a mechanism so that every federally recognized tribe is entitled to a base allocation right of 199 machines that it can, if it chooses, lease to another tribe more advantageously located for \$5000 per device per year. This amounts to about \$1,000,000 in annual revenue to any non-gaming tribe who chooses to lease its “rights” to other tribes.

Thus, unlike other states where tribes have shared revenue from gaming with state government, this Governor has chosen not to partake of the fruits of gambling but rather assure that Tribes share those fruits, as a matter of “right,” not as supplicants,

with all other tribes.

● Rights of workers and patrons protected. The compact assures that non-gaming related employees (e.g., restaurant, hotel laundry and valet parking) who choose a union can collectively bargain with tribes for certain worker protections. Unions who enter into collective bargaining agreements with tribes agree not to strike or picket tribes. Some tribes do not like this provision, but Pala feels that there is no reason not to extend these rights to employees who by a majority vote choose to have them.

Similarly, Pala agreed to provide workers' compensation, unemployment insurance and disability compensation to its workers, as well as protections from OSHA, the Fair labor Standards Act and the State's labor Code. We also agreed to utilize the Uniform Building Code and county standards for fire suppression and safety, as well as to provide adequate emergency medical services and security. We think these guarantees are good for the Tribe and for everyone affected.

● Cooperative regulation with the State to assure integrity of games. We agreed, indeed, invited, the State to do background checks on certain key employees and investors and to give the State rights comparable to what the National Indian Gaming Commission has to inspect and validate the integrity of our games. Again, this is in the mutual interest of the Tribe, our customers and the general public.

● County participation agreement on off-reservation environmental impacts. If a county, which is legally a subdivision of the State, chooses to do so, and does not

already permit in a majority of its jurisdiction gambling in card rooms, it may negotiate a government-to-government agreement with a Tribe to mitigate significant off-reservation environmental and related aspects of the Tribe's gaming facility. This does not apply to existing facilities, only expanded or new ones. This assures that non-tribal lands near the Tribe's gaming facility are not unreasonably and adversely impacted, and that citizens who are invited onto tribal lands are protected similarly to how they are protected when they enter non-tribal facilities open to the public.

● Arbitration is the principal way disputes are resolved. To avoid costly and time consuming litigation battles, the Tribe and the State, including the county if it chooses to negotiate a participation agreement with the Tribe, agree to resolve disputes through a neutral arbitrator.

Disputes over whether the Tribe is conducting class III gaming not authorized by the compact, however, go to federal court, and disputes concerning state law go to state court.

● Most favored nation provision. The compact contains a most favored tribe or nation provision, which means that if any later tribe conducts a more favorable compact provision than what Pala or other compacting Tribes enjoy, that they automatically get the benefit of the new and better provision. Already at least seven other tribes have entered into compacts with this Governor and some of their provisions are arguably better for tribes than what Pala negotiated for itself. Once we have identified all of

those provisions, we can amend our compact to take advantage of them

#### COMPARING PROPOSITION 5 TO THE PALA COMPACT

These features are, to paraphrase a once popular song, “just a few of our favorite things” about the compact. Pala feels it is, indeed, a model to be built on, not a ceiling or the best that Tribes can or will get, but a floor for improvement. In stark contrast to our compact, however, is Proposition 5 which several Tribes who do not like our compact are supporting for the November ballot. When we compare the compact with Proposition 5, Pala comes out in favor of the compact. Here’s why.

- Proposition 5 is a “cookie-cutter” compact imposed on all Tribes and the State. Proposition 5, if it passes in November and survives a likely court challenge as to its constitutionality, mandates the terms of class III gaming agreements between tribes and California with no negotiation, no compromise and no discussion. It is a take it or leave it compact that ignores the government to government relationship between States and tribes that our compact recognizes and respects.

- Proposition 5 contains no protections for workers and patrons. Unlike our compact, the initiative recognizes no rights of workers to rudimentary protections like unemployment and disability insurance, workers’ compensation, OSHA and Fair Labor Standards Act protections. It gives no rights to patrons that would guarantee the integrity of the games they play on tribal lands and resolve disputes over prizes in a neutral forum. This is bad business and unnecessarily tarnishes the reputation of tribes

as fair and decent.

● Proposition 5 contains no environmental protections for off-reservation impacts and gives no right to counties to negotiate agreements with tribes to protect non-Indians who come onto Indian lands to gamble. There are no provisions in the initiative to assure those with lands surrounding tribal gaming facilities that they will be protected from adverse environmental, traffic and law enforcement impacts. This is a huge gap that most feel needs filled some way; and our compact fills it fairly and responsibly.

● Proposition 5 is penny wise and pound foolish for tribes. The initiative, if passed and held constitutional, would essentially allow tribes, and tribes alone, to operate slot machines on their lands. Thus those tribes with video devices that now violate state law would not have to switch over to the new video lottery devices that are the subject of our compact. While this would benefit gaming tribes in the short run, it is the long term death knell for tribal gaming. Why? Because Proposition 5 is simply a statutory measure. What the tribes gain by its passage, any other group can then achieve by a legislative enactment or another statutory initiative. How can tribes justify to the people of California that they alone are entitled to have slot machines on their lands, and not race tracks, card rooms or other enterprises? We can, however, justify a virtual monopoly on video lottery devices because of the California constitution establishing the state lottery. Thus the compact is preferable in terms of long range tribal interests

because it legally permits tribes to close the door behind us with respect to the unique devices we alone (along, theoretically with the CSL) are permitted to operate on our lands.

### CONCLUSION

The Pala compact is fair to our Tribe and the public interest. It is not a grab all for tribes alone, like Proposition 5, but balances legitimate competing interests of tribes, law enforcement, workers, environmentalists, and local governments. It is truly a “model” that other tribes have successfully built on and gone beyond. We commend it to your Commission as a model that other states and tribes should examine.

#####