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

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

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

Allison.

MS. FLATT: Thanks. Good afternoon.

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

Since I am kicking off this portion of the hearing today, I'll use this opportunity to warn you that this is an extremely complex issue involving a very complicated Federal
Statute and years of litigation. Public policy on Native American gaming has been simultaneously influenced by judicial decisions, the legislative process, and the initiative referendum process, and it has brought in legislators, governors, Tribal Council members, prosecutors, judges, lawyers, lobbyists, public interest groups, and grassroots organizations, all of whom have different but important perspectives. I'll also add the obvious: This is a highly charged issue.

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

To provide some background on these broad issues, I will be focusing on just a few subjects that are particularly important to understanding the testimony that will be presented here today. These are: Tribal sovereignty; the Federal Statute that governs Indian gaming, known as the Indian Gaming Regulatory Act; and some related regulation and enforcement issues. Tribal sovereignty is at the core of the tensions between the federal, state and Tribal governments. Sovereignty is a word of many
interpretations, and it is used frequently and loosely in the debate over Indian gambling. I am certain that you will hear many references to it today and tomorrow, so I will attempt to give you some of the history behind it. It should be noted, however, that this is an extremely sensitive, if not sacred, subject to the Tribes and their advocates because it is also associated with the preservation of their cultural identity and independence. Therefore, any explanation I can provide in a couple of minutes is likely to be inadequate to a lot of people in this room. The basic definition, of course, is "the independent right or power to govern". The legal concept as applied to Native American Tribes is rated in the Constitution and further defined through judicial decisions which have limited it in certain areas over the years. Prior to the arrival of North Americans to North America, Native American Tribes were sovereign. They were independent and they conducted their own governmental affairs. During the colonization of America the British Crown dealt formally with the Native American Tribes as foreign sovereign nations. As the colonies grew and strengthened population it became apparent that the colonists were encroaching more and more upon Native American land.

Upon independence from Britain it was feared that if Native American affairs were left to the states, territorial conflicts would result in new wars with the Tribes that the United States, exhausted from the Revolution, was in no position to fight. The Constitution was therefore drafted so that the Federal Government would have responsibility for Native American affairs. Congress was granted the power to "regulate commerce
with the Indian Tribes", and the President was empowered to make
treaties with the consent of the Senate.

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

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

The Indian Gaming Regulatory Act, also known as IGRA,
was enacted in 1988. It enabled Tribes to operate gambling,
including casino gambling, on their Reservations so long as that
type of gambling was legal in the state in which the Reservation
was located. Now, IGRA divides gambling into three different classes.

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

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

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

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

I would just like to highlight a few of the areas that have been problematic and that remain unresolved. First,
the compacting process. A state is required by IGRA to negotiate in good faith with Tribes to conclude a compact. IGRA provides that if the state refuses to negotiate in good faith a Tribe can file what is known as a "bad faith" lawsuit in Federal District Court. A recent Supreme Court decision known as [Seminole] in effect gutted that provision. In the [Seminole] case the State of Florida raised the Eleventh Amendment of the Constitution as a defense, and the Eleventh Amendment provides that -- it prevents states from suing other states. And in this case the State argued that since the Tribes are sovereign entities they too should be prevented from suing. The Supreme Court agreed. Now, if the state asserts an Eleventh Amendment defense to a bad faith lawsuit, the case may be dismissed, and there is no further recourse for the Tribe. And the Secretary of the Interior is still negotiating with state and Tribal officials to develop some alternative administrative rules to allow Tribes a remedy when they assert that a state has not negotiated with them in good faith. These proposed alternative rules are very controversial and will be addressed by some of our panelists.

The second major litigation producing area is the scope of gaming allowed under IGRA. Now, assuming a state allows some form of Class III gambling, which as you may remember is the casino-style gambling, the question raised in litigation is whether the Tribe may, therefore, operate any other type of Class III game. Several states have argued that they should not be forced to negotiate and regulate games that are otherwise illegal in the state, even if they are very similar to other games that are permitted in the state, and some courts have agreed. Other
courts have held that if a state permits any Class III game then
the Tribes are permitted to operate any and all Class III games
as well. A related problem is the classification process for new
games. Since Tribes do not need a compact with the states to
offer Class II games, they generally prefer that the games be
classified as such. As new games are developed there is often
controversy over how they should be classified. And this is all
further complicated by the fact that the NIGC and the U.S.
Department of Justice have responsibilities that require them to
determine whether a game is Class II or Class III, and they
sometimes make different determinations. These inconsistencies
between two federal agencies necessarily cause big problems for
the Tribes because they may receive a letter from two different
agencies that contradict each other, leaving it unclear what is
permissible.

A third problem area is that some provisions of IGRA
have been practiced creating difficulties for the states since
they have a limited role under the statute. For instance, states
are not empowered to act against Native American Tribes if the
Tribes are operating gambling establishments without a compact,
such as here in California, or in violation of the compact. Only
the Federal Government has enforcement power, and in some
instances the Federal Government has chosen not to act. States
cannot tax Tribal gambling revenue or impose a property tax on
gambling facilities unless it is allowed through the compacts.
But they are required to provide some form of regulatory
oversight from local taxes and Native American Class III casino
games. Tribes are exempt from local taxes and local regulations
such as zoning, building, and environmental codes, but state and local governments must provide and service the infrastructure that makes the land valuable for casino development. In local municipalities this may mean that huge casinos with hotels, restaurants, do not fall within their jurisdiction, but they are nonetheless required to deal with the consequences.

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

As I explained earlier, regulation involves different government agencies depending on the classification of games as I, II, or III. The Federal Government, in the form of the National Indian Gaming Commission; the Tribe, in the form of the Tribal Gaming Office or Commission; and the state, through whatever agency it designates, each have a role in the regulation of gaming on Indian lands. In addition, the ability to enforce criminal laws is the exclusive jurisdiction of federal law enforcement. Now, the Tribes maintain that they are the most heavily regulated segment of the gambling industry, and that they
have to deal with frustrating inconsistencies in trying to comply with the rules of several different regulating agencies. However, states often complain that despite the fact that there are three separate regulatory bodies with some authority over Tribal gambling, no one has complete authority. For this reason state officials maintain that there are serious oversights, and that it is incredibly difficult to have a regulatory regime that depends on the consensus of political entities with diverse and sometimes conflicting interests.

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

Before I sign off I'd just like to elaborate on the recent activity on the Internet gambling legislation that the Chair mentioned in her opening statement, because it does have...
ramifications to Native American gambling. She said on July 23rd the U.S. Senate voted 90 to 10 in favor of the Kyl Bill to ban most forms of gambling on the Internet. In the process, on an 82 to 18 vote they rejected an amendment by Senator Larry Craig from Idaho that would have accepted Indian tribes from the ban. Now, Kyl had opposed this amendment saying that a Website operated from an Indian Reservation could be accessed by anybody who uses the Internet, and therefore, this would have created a huge loophole. A similar bill is pending in the House, and if it passes it is likely that Tribes will be prohibited from offering gambling on the Internet.

That's all I have.

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

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

MS. FLATT: Thank you.

COMMISSIONER LOESCHER: Madam Chairman?
CHAIRPERSON JAMES: Yes.

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

Thank you.

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