CHAIRPERSON JAMES: Mr. Kolkey.

MR. KOLKEY: Good afternoon, and thank you for this opportunity to address the Commission.

I am Governor Wilson's Legal Affairs Secretary and Counsel. I'm also the person who negotiated the back-room deal, the so-called back-room deal in the presence, by the way, of five attorneys that represent a significant number of the gaming Tribes in the State, and in the presence of the Pala Bank Executive Committee.

What I'd like to do today is talk about the challenges that the State of California faces under IGRA. To speak a bit about the lack of congruence between IGRA and the State's public policy on gambling. Next, the circumstances by which some Tribes in the State came to violate IGRA, and third, the accommodation the State has made with Tribes to try and accommodate State public policy vis-a-vis gaming, and the Tribes' sovereign interests.

First let me speak about IGRA and the gap that it creates in a state's public policy with regard to gaming. California faces some real challenges under IGRA. For one thing, as mentioned earlier, there are some 100 or more federally recognized Tribes in California. That means the Tribal gaming operations can create a significant exception to a state's public policy vis-a-vis gaming.

Secondly, California is a noncasino state. And yet by virtue of IGRA California has an obligation to negotiate with Tribes over the establishment of gaming facilities that
heretofore had not existed legally anywhere in the State. And I'll talk about that a little bit further.

And third, as a result of some of the shortcomings of IGRA, we have a situation in California where some 39 Tribes are operating casinos in violation of both federal and state law because these casinos do not have a compact as required by federal law, and they're operating slot machines which are prohibited by state law, and by virtue of federal law.

Let me now focus specifically with respect to IGRA. As Allison mentioned in her introduction to these panels, there are three forms of gaming under IGRA; Class I, Class II, and Class III, and I'm going to address Class III which is the casino-style gaming. A Tribe cannot operate Class III gaming unless the gaming activity is legally permissible in the State, and it's done in conformance with the Tribal-State compact that regulates that gaming. But the phrase that the gaming has to be legally permissible in the State still holds the potential for creating a large exception to a state's public policy on gaming.

For instance, as you heard from the Connecticut Attorney General at an earlier hearing, Connecticut permits charities to have Las Vegas nights, and those charities can operate games of chance. The Second Court of Appeals said that because charities can operate games of chance during Las Vegas nights, the State had an obligation to negotiate with Tribes over those games of chance for casinos that could run day and night. In other words, a Las Vegas night was transformed by IGRA into the obligation to negotiate over casinos that operated every day and every night.
In California, as I mentioned California is a noncasino state. The California Constitution prohibits casinos of the type operating in Nevada and New Jersey. The State Penal Code prohibits slot machines, roulette, dice, blackjack, banked card games. The State only permits horse racing, nonbank card games, bingo for charities, and it has a state lottery that was established in 1984 to provide funds for education. Since IGRA says that a Tribe can operate any type of gaming activity that is permissible under state law, that means that since California has a state lottery, and even though no one else in California can offer lottery games, the Tribes are entitled to negotiate over the operation of lottery devices. Even though California does not have any gaming facilities, but simply offer lottery devices, the state lottery will simply have a single vending machine in a convenience store or Seven-11 or a clerk can provide lottery tickets from behind a counter. Because the Tribes are entitled to negotiate over lottery games, they can negotiate over gaming facilities full of lottery games that heretofore never existed in California. So by virtue of IGRA, a Tribe can open up a gaming facility even though California has never permitted gaming facilities in the State.

As I will get to in a moment, the Governor has attempted to accommodate these gaps and problems in connection with the compacting process. In addition to the fact that IGRA allows a nature of gaming operations that the State heretofore has not permitted, IGRA has some other shortcomings.

Number one, the State is obligated to negotiate in good faith with a Tribe over a compact, but the Tribe has no
concomitant obligation to negotiate in good faith over that compact. The Tribe, yes, risks not getting a compact if it fails to be flexible in those negotiations. But the Tribe under IGRA can also sue if it claims the State has negotiated in bad faith, and the focus of that litigation is not on the Tribe's conduct so much as on the State's conduct because the Tribe has no obligation to negotiate in good faith.

Now, you heard about the Seminole Decision which allows states to bar cases charging bad faith on the basis of the Eleventh Amendment, but in the Ninth Circuit, the Ninth Circuit in the case called U.S. vs. The Spokane Tribe held that if a State does bar a bad faith suit by reason of the Eleventh Amendment, the Tribe's uncompacted gaming, if the Tribe is violating IGRA, may not be able to be enjoined. The Ninth Circuit's theory was that IGRA allowed a remedy for bad faith negotiation, if the State bars that remedy by raising the Eleventh Amendment then perhaps there should not be a remedy in response to a Tribe's uncompacted, unlawful gaming.

In any event, the State has in recent times been waiving it's an Eleventh Amendment immunity and, therefore, responding to suits brought by Tribes claiming that the State has acted in bad faith. But to reiterate, IGRA does create an exception, a gap in the State's public policy on gaming, and therefore, consideration ought to be given to reform IGRA to:

One, make sure that it conforms better with the State's public policy. That it requires a Tribe to negotiate in good faith as well as the State. That it give the State the power to close down uncompacted gaming, because right now a state
has no power to close down illegal, uncompacted gaming, and finally there ought to be a remedy for Tribes that can show bad faith on the part of the State, but that remedy ought to be one that conforms with the State's public policy.

Let me now move to what the situation factually is in California. In fact this is what happened. After the State had negotiated some off-track betting compacts with the some tribes, in 1991 and 1992 the State commenced negotiations with a number of tribes. Sixteen tribes had a joint negotiation with the State and some other tribes had some separate negotiations. Those negotiations were over other Class III activities. A dispute soon arose as to whether or not the State was obligated to negotiate over games that were illegal under state law, namely slot machines and percentage card games. Because of this disagreement, both the State and tribes agreed to take the matter to court and have a court decide whether the State had an obligation to negotiate over games that were illegal under state law. The agreement also provided that if the District Court ruled in favor of the tribes as to particular games that the tribes would not request the State to negotiate a compact over those disputed games until an appeal had been determine.

Well in 1993 the District Court held that even though state law may not have permitted the particular games that the tribes wanted to negotiate over, they were functionally similar to the terminals that the State Lottery was using and, therefore, said the state had an obligation to negotiate over them. The State pursuant to its agreement took that on appeal and the Ninth Circuit reversed and held that the State had only an obligation
to negotiate over those gaming activities permitted under state law but no obligation to negotiate over a gaming activity that may be similar but is not permitted under state law.

However, during the course of that appeal and without waiting for the outcome, tribes began to engage in uncompacted gaming. They started using the very machines in dispute and without a compact as required by federal law began to open casinos in the state of California puncturing a huge hole in the State's public policy.

Finally by February of 1994 it appeared to the State that there was no purpose to be served in continuing to negotiate with tribes that were already doing everything and more than they wanted without a compact. In essence if a tribe can engage in illegal gaming until it concludes a compact, it has little incentive to conclude a compact that restricts it to legal gaming. So, the negotiations then ended.

In August of 1996 a law abiding tribe, the Pala Band asked to negotiate a compact with the governor and pursuant to our obligations under federal law we agreed. Seventeen months later we had put together a compact that bridged the differences between state public policy and the tribe's interests in gaming, and that compact, as you've heard, did the following to bridge the two positions.

Number one, it allowed the tribe to engage in any legally permissible form of gaming in the state of California under the State Lottery Act. Whether or not the State Lottery was operating that game, the tribe could engage in any legally permissible form of gaming. But in light of the fact that the
tribe wanted to establish gaming facilities which heretofore did not legally exist in California, there had to be some way to provide some encouragement of state public policy against gaming and as a result there was an agreement, there would be a restriction on the number of lottery devices.

The agreement provided that the tribe could have 199 lottery devices and then license additional devices from other tribes up to 975. And that had a dual benefit. Number one, it provided an arrangement whereby all tribes in the state, if they wanted to enter into an agreement, could get lottery devices which they could then license to another tribe whether or not they could use them. That allowed all tribes in the state, whether they were gaming or non-gaming, to benefit from gaming revenues by licensing their devices. And the other benefit of this is that it provided a discouragement on the expansion of gaming facilities in the state because in return for licensing a tribe's devices to another tribe, that tribe would not be engaged in gaming facility operations itself. It would forego those operations in return for licensing its devices to another tribe that could use them more.

The other thing that the agreement did is provided protections to the California public with respect to the gaming because as you have probably heard by now, gaming is unlike other industries. They are an externalities. There are social and economic consequences that go beyond, well beyond any gaming facility throughout the surrounding community. And, indeed, as a result the State wanted to provided some state law protections with respect those gaming operations.
What the State did is it provided that the tribe would negotiate an agreement with the local governmental jurisdiction over local issues mitigating the environmental effects of the gaming on the surrounding community. That was a government to government negotiation that respects the tribe's sovereignty but allowed for mitigation of environmental effects.

Number two, it provided for protections for patrons from injuries by allowing the patrons to bring claims that they are injured on a tribe's reservation during the gaming operations.

And third, it gave patrons arbitration, a right to arbitrate disputes over their winnings.

Right now, if a patron on a tribal reservation in California wins and there is a refusal to pay, there is nothing the patron can do because the tribe has sovereign immunity. They can simply refuse to pay. Now it may be good business to pay many of those disputes, but the fact of the matter is, the patron has no right to a claim.

Finally, what the compact is, it provided protections from the -- for the employees of the tribal facilities. These employees come from outside the reservation and again at these tribal facilities, tribes may offer various benefits but there is no right of appeal if an employee is denied those benefits. The governor's office gets many complaints about the denial of Workers' Compensation benefits from various facilities. We want to provide that state employees would get the benefit of state law protections for Workers' Comp, for unemployment, for disability insurance, and we also provided that service employees
would have the right to concerted action and to self-
organization. But again in a compromise with the tribes, they
would only get that right with respect to recognizing an employee
organization if the employee organization agreed to a no strike
clause, if the employee organization deferred for a year
recognition of the organization and deferred for two years
negotiation of a collective bargaining agreement, and agreed to
arbitrate labor disputes.

So this was a balance to provide protections for
employees, at the same time not providing the labor laws of the
state to cover all aspects of the tribe's operations.

I see my time is up and so with that, let me close
and say that tribes are clearly entitled to a part of the
American dream. We need to encourage tribal economic
development. The Governor wants to reach compacts with tribes
that accommodate state public policy but we've got to recognize
that with gaming there are externalities that go well beyond the
borders of a tribe's reservation that require that the state play
an important role with respect to those gaming operations and its
public policy be respected.

Thank you, and I'm sorry for going over time.

CHAIRPERSON JAMES: That's all right. Thank you, Mr.
Kolkey.