CHAIRPERSON JAMES: Mr. Dickstein.

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

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

Obviously, you know where my client, the Pala Band stands on these issues. But looking at your statute and your charter, and trying to figure out what interest you have in this dispute, many of the issues that have been discussed will be gone including the proposition long before your review report comes out. It struck me that what happened in California really is a symptom of some of the problems with IGRA. And, I've thought of
five or six of them, and I'll just mention those now and then try
to deal with some of the points that I've heard over the past
hour or two that I may have different views on than those that
have been mentioned.

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

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

In particular in California, you had pretty
sophisticated Class II operations and some court decisions before
IGRA which appeared to give the tribes a great deal of discretion
over the type of gaming that they were engaged in and tribes
moved forward with those court decisions and began to develop
regulatory systems which they were comfortable with and for the
most part have proven to be good ones. There are exceptions but
tribes obviously believe with good reason that they have
protections in place.
That doesn't mean, however, that other governmental entities or people off the reservation always agree and I think that's the point of IGRA, is to try to take all the -- all of this into account.

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

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

But by that time things had developed on Indian lands in California to the extent that it became very difficult to put the horse back in the barn. That definition is vague to this day. The regulations that were then adopted and disagreements over what they are. And I think it was again a little bit naive.
to think that by trying to define that distinction in a few words
without any real recognition of the immense difference between
electronic and paper games that underlies this dispute.

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

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

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

One other aspect of the interplay between state and
federal law that's been mentioned was that while state law may
apply, only the United States has jurisdiction to enforce the
law. So where the state and the tribe really are the ones that
were concerned, and the parties and their policies are at stake;
the IGRA reads, it's the Federal Government that has exclusive
jurisdiction to enforce the laws.
And the Federal Government, I think, was confused during this period. It saw that what was happening may or may not be legal. It waited until it could get clarified. By that time the industry had developed quite a ways and then by the time it became clear that probably most of what was going on was Class III and there should be a compact, problems developed over whether or not the governor would negotiate with tribes that were engaged in gaming that violated state law.

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

I think in addition looking at it now and looking at possible changes to IGRA in the future that this Commission may recommend, I think that there was again a lack of understanding about the depth of adversarial relations between the states and tribes, a lack of trust between the states and tribes. And you see it expressed in this testimony. But it really again is one of the most important underlying reasons for the current dispute, and really the mess that we have in California right now over Class III gaming.
The parties have literally hundreds of years of mistrust. The, you know, as Allison said in her opening summary for you, the states haven't played much of a role in reservation activities, very -- they played a very minor role. And yet in 1988 Congress mandated agreements between the state and the tribes, and expected that these agreements would suddenly be in place. And it just wasn't going to happen that easily. There's a traditional notion or zone of sovereignty the tribes have become accustomed to.

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

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

And certainly in this field and we're talking about gaming, I think that Pala feels that their interest is to ensure that they have a profitable gaming operation, that the state does
not interfere with their internal relations. But they have no
problem guaranteeing protections to patrons, to employees, to --
including the right of workers to collectively bargain if they
choose. That was just never really an issue for Pala.

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

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

Well, Pala has sponsored legislation and there is
legislation pending right now in the California legislature to do
just that. And the legislature goes out of session, I think, for
the year at the end of August so we're certainly going to know by
then whether or not a compact has been ratified.

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

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

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

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

On the other hand that hasn't been determined yet,
the Ninth Circuit seemed to indicate that that was probably not
the case. So we operated under that assumption with the
understanding that if an assumption is wrong the tribe would
benefit. And that decision is probably going to come down in a
matter of weeks. There's motions on summary judgments that are pending, and the case has been taken under submission.

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

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

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

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

But, thank you very much.
CHAIRPERSON JAMES: No, thank you. And thank you to all of our panelists.