

1 CHAIRPERSON JAMES: Mr. Kolkey.

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

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

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

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

25 Secondly, California is a noncasino state. And yet
26 by virtue of IGRA California has an obligation to negotiate with
27 Tribes over the establishment of gaming facilities that

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1 heretofore had not existed legally anywhere in the State. And
2 I'll talk about that a little bit further.

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

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

19 For instance, as you heard from the Connecticut
20 Attorney General at an earlier hearing, Connecticut permits
21 charities to have Las Vegas nights, and those charities can
22 operate games of chance. The Second Court of Appeals said that
23 because charities can operate games of chance during Las Vegas
24 nights, the State had an obligation to negotiate with Tribes over
25 those games of chance for casinos that could run day and night.
26 In other words, a Las Vegas night was transformed by IGRA into
27 the obligation to negotiate over casinos that operated every day
28 and every night.

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1 In California, as I mentioned California is a
2 noncasino state. The California Constitution prohibits casinos
3 of the type operating in Nevada and New Jersey. The State Penal
4 Code prohibits slot machines, roulette, dice, blackjack, banked
5 card games. The State only permits horse racing, nonbank card
6 games, bingo for charities, and it has a state lottery that was
7 established in 1984 to provide funds for education. Since IGRA
8 says that a Tribe can operate any type of gaming activity that is
9 permissible under state law, that means that since California has
10 a state lottery, and even though no one else in California can
11 offer lottery games, the Tribes are entitled to negotiate over
12 the operation of lottery devices. Even though California does
13 not have any gaming facilities, but simply offer lottery devices,
14 the state lottery will simply have a single vending machine in a
15 convenience store or Seven-11 or a clerk can provide lottery
16 tickets from behind a counter. Because the Tribes are entitled
17 to negotiate over lottery games, they can negotiate over gaming
18 facilities full of lottery games that heretofore never existed in
19 California. So by virtue of IGRA, a Tribe can open up a gaming
20 facility even though California has never permitted gaming
21 facilities in the State.

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

27 Number one, the State is obligated to negotiate in
28 good faith with a Tribe over a compact, but the Tribe has no

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

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

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

25 One, make sure that it conforms better with the
26 State's public policy. That it requires a Tribe to negotiate in
27 good faith as well as the State. That it give the State the
28 power to close down uncompact gaming, because right now a state

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1 has no power to close down illegal, uncompact gaming, and
2 finally there ought to be a remedy for Tribes that can show bad
3 faith on the part of the State, but that remedy ought to be one
4 that conforms with the State's public policy.

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

22 Well in 1993 the District Court held that even though
23 state law may not have permitted the particular games that the
24 tribes wanted to negotiate over, they were functionally similar
25 to the terminals that the State Lottery was using and, therefore,
26 said the state had an obligation to negotiate over them. The
27 State pursuant to its agreement took that on appeal and the Ninth
28 Circuit reversed and held that the State had only an obligation

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1 to negotiate over those gaming activities permitted under state
2 law but no obligation to negotiate over a gaming activity that
3 may be similar but is not permitted under state law.

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

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

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

24 Number one, it allowed the tribe to engage in any
25 legally permissible form of gaming in the state of California
26 under the State Lottery Act. Whether or not the State Lottery
27 was operating that game, the tribe could engage in any legally
28 permissible form of gaming. But in light of the fact that the

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1 tribe wanted to establish gaming facilities which heretofore did
2 not legally exist in California, there had to be some way to
3 provide some encouragement of state public policy against gaming
4 and as a result there was an agreement, there would be a
5 restriction on the number of lottery devices.

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

21 The other thing that the agreement did is provided
22 protections to the California public with respect to the gaming
23 because as you have probably heard by now, gaming is unlike other
24 industries. They are an externalities. There are social and
25 economic consequences that go beyond, well beyond any gaming
26 facility throughout the surrounding community. And, indeed, as a
27 result the State wanted to provided some state law protections
28 with respect those gaming operations.

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1 What the State did is it provided that the tribe
2 would negotiate an agreement with the local governmental
3 jurisdiction over local issues mitigating the environmental
4 effects of the gaming on the surrounding community. That was a
5 government to government negotiation that respects the tribe's
6 sovereignty but allowed for mitigation of environmental effects.

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

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

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

19 Finally, what the compact is, it provided protections
20 from the -- for the employees of the tribal facilities. These
21 employees come from outside the reservation and again at these
22 tribal facilities, tribes may offer various benefits but there is
23 no right of appeal if an employee is denied those benefits. The
24 governor's office gets many complaints about the denial of
25 Workers' Compensation benefits from various facilities. We want
26 to provide that state employees would get the benefit of state
27 law protections for Workers' Comp, for unemployment, for
28 disability insurance, and we also provided that service employees

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1 would have the right to concerted action and to self-
2 organization. But again in a compromise with the tribes, they
3 would only get that right with respect to recognizing an employee
4 organization if the employee organization agreed to a no strike
5 clause, if the employee organization deferred for a year
6 recognition of the organization and deferred for two years
7 negotiation of a collective bargaining agreement, and agreed to
8 arbitrate labor disputes.

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

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

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

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

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