Approved: 1-25-93
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Clyde Graeber at 1:30 p.m. on January 12, 1993 in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Mary Galligan, Legislative Research Department
Lynne Holt, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee: Carol Anske, Chairperson, Kickapoo Nation
Lance Burr, Attorney General, Kickapoo Nation
George Wahquahboshkuk, Chairperson,
Prairie Band of Potawatomi Indians
Bob Page, Potaluck Corporation
Rep. Galen Weiland
Mike Frost, Hiawatha Foundation for Economic Development
Jim Scherer, Mayor of Hiawatha
Kip Kubin, Miami Nation of Oklahoma

Others attending: See attached list

Clyde D. Graeber, Chairman, called the meeting to order at 1:30 PM and stated this was the first meeting of the Federal and State Affairs Committee and today's topic deals with the Indian Gaming Compacts and the legislation proposed by the LCC and introduced on their behalf.

The Chairman then introduced Lisa Benlon, Vice Chairperson and Kathleen Sebelius, Ranking Minority Member.

Mary Galligan, Legislative Research Department, gave a staff briefing on HB 2023, an act concerning gambling; providing procedures for negotiating and entering tribal-state gaming compacts; relating to implemention of such compacts; amending K.S.A. 21-4302 and K.S.A. 1992 Supp. 21-4306 and 21-4307 and repealing the existing sections. (See Attachment #1).

Mary Torrence, Revisor of Statutes, gave a briefing regarding the case law. (See Attachment #1).

Discussion was had regarding the case law.

It was asked if there was anything now that constitutionally prohibits the state from engaging in casino gambling. Constitutionally, as the lottery has been interpreted there is nothing that constitutionally prohibits the state from engaging in casino gambling. It would require enabling legislation, however.

Staff stated there is no constitutional prohibition; the criminal statutes do prohibit gambling other than those games that the lottery is permitted to conduct. There currently is a criminal prohibition but not constitutional prohibition.

Staff stated Connecticut did not want to negotiate until all legal issues were resolved and in that case, the Pequot case, the courts said they had to go ahead. We have to find out what the law is and LCC felt this procedure needed to be established and negotiations need to be done.

A member stated, it is my understanding that we negotiate or else face litigation, is that correct?

Staff stated that was correct.

It was further asked, if we don't negotiate we go to court and the court decides, is that correct?

Staff stated that was correct.

The Chairperson opened the hearings on HB 2023.

Carol Anske, Chair, Kickapoo Nation, stated that due to inclement weather, Leaford Bearskin, Chief, Wyandotte Tribe of Oklahoma, Sandy Keo, Chair, Sac and Fox Nation and Steve McGiffert, Legal Counsel, Iowa Nation, would not be attending the hearings.

Lance Burr, Attorney General, Kickapoo Indian Nation, appeared before the committee as a proponent for HB 2023. (See Attachment #2)

It was asked of Mr. Burr if he felt the Governor had the authority to sign a compact.

Mr. Burr stated, yes, in California the Governor signed off on 5 compacts. He cited cases to support that action.

A member asked of Mr. Burr, can the Governor independently sign compacts and does the Governor act for the state of Kansas?

Mr. Burr replied, yes.

It was further asked, when we talked last year about the procedures and policies to set up legislative involvement, was it fair to say that neither the Governor's office or you were enthusiastic about proceeding with that in light of the fact the court case was going to establish the Governor's authority?

Mr. Burr stated, we are willing to listen to any proposal.

It was stated that the court ruled in July that the legislature had oversight and could be involved.

Mr. Burr stated the concern is that the matter has been moving along for five years and it should have been completed by now.

A member asked Mr. Burr about the good faith negotiation on the part of the state of Kansas. IGRA is silent was that what constituted good faith?

Mr. Burr stated, we know some action has to be taken within 180 days. The tribes are willing to sit down and work with you at any time.

A member stated there are 11 1/2 pages in the bill and they received it the morning of this hearing and would like to ask if you feel that is a lot of material in the bill. What would you eliminate in the bill?

Mr. Burr stated he would like the Council to look at it and discuss with them before commenting on that. It looks like the bill was designed to set up a continuing procedure to renegotiate and that is troubling to the Kickapoo Council. We are concerned about holding public hearings at this late date -- not for you but for us. We are concerned about setting up another agency rather than using the Lottery Commission.

George Wahquahboshkuk, Chair, Prairie Band of Potawatomi Indians, testified in favor of HB 2023. (See Attachment #3)

A member asked if it were the hope of the Tribe that proverty and unemployment would decrease if they operated casinos?

Mr. Wahquahboshkuk, remarked they remained optimistic and with the compact as it is, it addresses our needs.

A member stated in the Bahamas the citizens aren't allowed to gamble in the casinos, will there be rules and regulations for that?

Mr. Wahquahboshkuk stated the Indian Tribes are not a dictatorship and do not say what their people can and cannot do; however, this tribal council does not feel that the Indians should be gambling.

Representative Weiland testified in support of HB 2023. The 49th District has three Indian reservations and supports the Indian Nation's legal right to conduct Class III gaming activities. (See Attachment 4)

Representative Weiland introduced Mike Frost, Hiawatha Foundation for Economic Development and Mayor Jim Scherer, Hiawatha.

Mike Frost, Hiawatha Foundation for Economic Development, testified in support of HB 2023. (See Attachment # 5)

A member asked if the market was saturated?

Mr. Frost stated that the better ones would survive.

Mayor Jim Scherer testified in support of HB 2023. (See Attachment #6).

Bob Page, Former CEO, Mystic Lake Casinos, Minnesota, and Acting General Manager of Treasure Island stated he is now working with the Indians and has been involved in this type of activity since 1982. He stated he was very familiar with IGRA and brought casino gambling to Minnesota. He had training in New Jersey and Holland, which country has the best casinos in the world. Usually 80% of the employees are non-Indians. It is tough business and hard work, but good business for the tribes.

A member asked what the revenue projections were.

Mr. Page did not want to answer at this time -- rather refer to the Tribal Council.

A member asked, does Minnesota compare to Kansas?

Mr. Page stated he saw no difference.

It was asked how many casinos were in Minnesota.

Mr. Page stated 16.

The following attachments were handed out but no testimony given: Sunflower Racing (Attachment #7), Sandra Keo, Chairperson, Sac and Fox Tribe of Missouri (Attachment #8) and City of Horton (Attachment #9)

The hearing was closed for proponents on HB 2023 and the meeting adjourned at 3:20 PM. The next meeting will be January 13 and hearings will continue on HB 2023 for opponents.

Date: 1/12/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Patty Peterson	Mirage Resorts, Inc.	Topeka, KS
John C. Bottenberg	Video Lottery Tech	Topek, Ks
Jim Gordon	Kansas Lottery	Topeka Ks.
Carl Anderson	" "	" "
Ralph Decker	" "	" "
Don Schmidley	Kansans For Life At Its Best	" "
Robert Hoehnen	Topeka	524 W. 6th Topeka Ks
Charles S. Harman	Self	Topeka Ks.
Long Belle Smith	Kickapoo Tribe in KS	Horton, KS
Lacene Thomas	Prairie Band Potawatomi	Mayetta, KS.
Esther Wahwasuck	Prairie Band Potawatomi	Mayetta, Ks.
DENNIS L. ROGERS	NAVAJO NATION	Topeka, KS
Adelia M. Gutierrez	Voting Kickapoo Tribal Member	Horton, Ks
Doug Smith	MAGIC HA HA	Topeka
Leandra Blalock	Kickapoo	Horton KS

Date: 1/12/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Eugene J. Waldie Jr	Prairie Band Potawatomi	Horton, KS
Floyd LaClaire	Prairie Band Pottawatomi	Topeka KS
Charles Stewart	Miami Tribe	Lenexa, KS
Wm Logan	Miami Tribe	Lenexa, KS
[illegible]	KS [illegible]	Topeka
Marty Patton	Kickapoo Tribe	Topeka KS.
Karen Morgan	Kickapoo Tribe in Kansas	Topeka Ks.
Christopher Rage	Kickapoo Tribe	Topeka KS.
Roger Franzke	Ks Govt Consulting	Topeka KS
Bill McCormick	Governor's Office	Topeka, KS
John Thomas	Kickapoo Tribe	Kickapoo Rez
Whitney Damron	Pete McGill's Associates	Topeka, Kansas
Patrick J. Hurley	McGill & Asso	" "
Galen Weiland	State Rep	Bendena, KS
Todd Manning	Hiawatha Daily World	Hiawatha, KS

Date: 1/12/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Kevin M Walker	SENATE PRESIDENT'S OFFICE	ROOM 357-E
Jill Meyer	Intern from University of Kansas	LAWRENCE
John Hanna	AP	134-N
Rich Blum	KSNT	6835 NW U.S. 24 TOPEKA
Roger Myers	Cap-Journ	
Mary Ellen Conlee	Prairie Band of Potawatomis	Wichita
Robert D Page	Potawatomi Corp	Prior Lake, MN
George Wahquahboshkuk	Chairman Prairie Band Potawatomi Tribe	Mayetta, KS
Mark McGee	Pot A Luck Corp.	WAYZATA MN
ALAN COBB	Prairie Band of Potawatomi	Wichita
Carol McDowell	Mirage Resorts, Inc.	Topeka, KS
Nancy Zielke	City of KCK	Kansas City
TED HAUSER	CITY OF HORTON	HORTON
Bob MARTIN	CITY Commission	HORTON, KS-
Jim Walney	Director of Police	Wamego

Date: 1/12/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Kip Kubin	Atty for Miami Nation	Overland Park
Dallas L Corbet	City of Hiawatha Ks	305 S 6th Hiawatha Ks
Dick Eckert	Yemaha Co. Wetmore, KS	P.O. Box 157 Wetmore KS 66550
James T Scherer	Mayor City of Hiawatha, Ks	109 South 6th Hiawatha, Ks 66434
Mike Frost	Hiawatha Foundation for Economic Development	411 N. 7th Hiawatha Ks 66434
Fred Thomas	Kickapoo Tribe in Ks	RI P.O. Box 271 Horton, KS 66439
Brent Doane	College consulting Potawatomi Nation	Topeka
Robert H Sines	Hiawatha Chamber of Com. & Heart Lake Inn	709 Shawnee Hiawatha Ks
Merlin Lillie	Hiawatha Chamber of Com Hearthland Inn	904 N 6th Hiawatha, KS
Don Holladay		RT 1 Box 2 Hiawatha Ks
Carol J Clarke	Chairperson, Kickapoo Tribe in Kansas	P.O. Box 271 Horton, Ks. 66439
Nancy Bear	Treasurer - Kickapoo Tribe in Kansas	PO Box 271 Horton, Ks 66439
Barry A. Stokes	Hiawatha Foundation for Economic Development	607 Utah St Hiawatha, Ks 66434
John Means	" "	Box 360 Hiawatha, Ks.
L. Renee Hixon, CPA	Hiawatha Foundation for Economic Development Inc. Treas	120 N. 6 7th St Hiawatha, Ks.

Date: 1/12/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Steve Franke	Hiawatha Chamber of Director Commerce	Hiawatha, KS
Charles Hartman	Hiawatha Foundation For Economic Development	Hiawatha, Ks
Randy Fee	Hiawatha Chamber of Commerce	Hiawatha, KS
Karen Catalano	Intern - Rep. Bishop	Lawrence KS
Jerry Hoffard	R.D.A. of N.E.K	Hiawatha Ks.
Gary Weiland	City of Hiawatha	Hiawatha Ks
Ray Barmby	Columbian Securities Corp	Olathe, KS
Anna Gutierrez	Secretary for Tribal Council (Kickapoo Tribal Member)	Horton, KS
Lance Burr	Attorney General for the Kickapoo Nation	16 E. 13th Lawrence, KS. 66044
Neil Woerman	Ks. Atty Gen. Off.	Topeka
Allan Steppat	Pete McGill & Assoc.	Topeka
Rob McKnight	The Ceres Group	Overland Park, KS.
Walt Daniels	Ks Division of Budget	Topeka
Denny Burgess	Sunflower Racing	Topeka
George Barbee	IGT	Topeka

Date: 1/12/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Joseph W. Hale	Prairie Band Potawatomi	Mayetta, KS
Wahsai Hale	Potawatomi	Mayetta KS

RANSMITTAL MEMORAN JM

Kansas Legislative Research Department

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January 7, 1993

To: House Committee on Federal and State Affairs

From: Mary Galligan, Principal Analyst

Re: Committee Meetings January 12 and 13

Representative Clyde Graeber asked me to inform you that the Committee will meet from 1:30 p.m. to 3:30 p.m. on Tuesday, January 12 and Wednesday, January 13 in Room 313-S (old Supreme Court chambers). The purpose of these meetings will be to conduct hearings on Indian Gambling Compact procedures. The tentative schedule includes a staff briefing and testimony from proponents and opponents. Representative Graeber has also asked me to contact the Attorney General about appearing at these hearings.

Enclosed is a copy of material prepared this fall for the Legislative Coordinating Council by staff. Representative Graeber asked that you each receive a copy of this material prior to the hearing.

If you have any questions, please feel free to call.

Also enclosed is the bill that will be introduced today - January 11.

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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

January 11, 1993

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

The Honorable Clyde D. Graeber
State Representative, District 41
State Capitol
Topeka, Kansas 66612

Re: Indian Gaming Legislation

Dear Representative Graeber:

As the 1993 Legislative Session begins, I would like to bring you up to date on Indian gaming in Kansas and the urgent need to adopt legislation to provide our state with a framework through which to negotiate and adopt appropriate compacts with Indian tribes and nations. It is important to state at the outset that to adopt a framework to negotiate and approve compacts is not a positive or negative expression of your sentiments on Indian gaming. It is simply necessary for Kansas to have such a framework in place to protect the state's best interests as well as to protect the policy-making role of the Legislature to the greatest extent possible. The Legislative Coordinating Council (LCC) agreed to draft such legislation, and I ask that you make adoption of a procedure one of your earliest legislative priorities. To this end, I was pleased that the House has scheduled hearings to begin this week on the LCC proposal.

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA). The act sought to provide order and regulation to what it was believed would otherwise be the unfettered and unregulated proliferation of casinos and gaming on Indian lands throughout the country. There is a great deal of disagreement and uncertainty as to the actual affect of the act and as to its interpretations. However, in Kansas, because the State Constitution was amended in 1986 to allow for a relatively unrestricted state lottery, IGRA provides Indian tribes and nations with the right to operate gaming, including casinos, on certain Indian land.

Last year, the Governor attempted to unilaterally enter into compacts required by IGRA for Indian tribes to proceed with gaming in Kansas. In an effort to protect the Legislature's role in the compact process, I filed suit before the Kansas Supreme Court challenging this unilateral action, and the Secretary of Interior withheld his required approval of Kansas compacts until the issue was resolved. July 11, 1992, the Kansas Supreme Court unanimously upheld my opinion that the Governor could not enter into such

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compacts alone and the Court set forth the role of the Legislature in the process.

Under IGRA, the state is required to negotiate in good faith and enter into compacts with tribes. If the state does not, IGRA may be interpreted to allow the federal courts to establish the rules for Indian gaming within a state with little or no state input. In October, 1992, two Kansas Indian tribes, the Potawatomi and the Kickapoo, filed suit against the state, attempting to force the adoption of compacts so they could open casinos. I am defending the state in these actions. While there are defenses I will assert in these cases, I believe the best means for the state to assure the ultimate protection of all of our citizens' interests is to establish a process to negotiate and approve these compacts. No such process now exists.

The Federal judge to which these cases are assigned is moving them on a fast track. He has scheduled a status conference for February 12, at which time it is clear he will assess the progress the state has made in developing a compact negotiation and approval process. I believe the state would be best served by that process being in place by that time.

I will be available to assist with this legislation in any way possible. If you have any questions, please contact me or Deputy Attorney General Julene Miller, the head of my Civil Division, and we will attempt to answer them. I will appreciate your consideration in making this issue an early priority of the 1993 Legislative Session.

Very truly yours,

Robert T. Stephan
Attorney General

RTS:naw

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INDIAN GAMING BRIEFING

Kansas Legislative Research Department
and
Office of Revisor of Statutes

Revised January 6, 1993

MEMORANDUM

Kansas Legislative Research Department

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August 6, 1992

To: Representative Marvin Barkis

From: Mary Galligan, Principal Analyst and
Mary Torrence, Assistant Revisor of Statutes

Re: Options for Negotiating Indian Gaming Compacts

This memorandum was prepared in response to your request for a list of options for consideration regarding negotiation of Indian gaming compacts in light of the recent Kansas Supreme Court opinion in *State of Kansas, ex rel. v. Finney*. That opinion is summarized in a separate memorandum. Also attached for your review are memoranda on the following topics:

- a summary of bills considered during the 1992 Legislative Session that would have established negotiating procedures;
- a summary of major provisions of the federal Indian Gaming Regulatory Act;
- a review of other states' laws regarding negotiation of Indian gaming compacts; and
- a list of policy standards or issues that the Legislature might wish to include in a law that establishes a negotiating procedure.

Legislative action, either to approve compacts or to establish a procedure for negotiation and approval of compacts, cannot be initiated until the Legislature convenes in January. Prior to that time the Legislative Coordinating Council might:

- designate a special committee to study the issue, participate in negotiations as appropriate, and develop recommendations for the 1993 Legislature regarding legislation necessary to establish a negotiation process;
- assign a subcommittee of the LCC to undertake those tasks enumerated above; or
- designate one of the standing committees to begin consideration of the issue and any necessary legislation after the 1993 Legislature convenes.

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In general terms, the procedural options available to the Legislature include the following:

- make negotiation and approval of Indian gaming compacts a specific statutory duty of the Finance Council or an executive branch entity by enumerating standards and procedures for that process;

- statutorily designate an entity to negotiate on behalf of the state (perhaps a committee composed of both executive and legislative branch representatives), retaining final approval of any proposed compact for the Legislature.

These options could be explored in detail and perhaps other options could be identified through additional study.

We hope this information is useful to you. If you have any additional questions or need additional information, please feel free to call.

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To: Speaker Marvin Barkis

From: Mary Torrence, Assistant Revisor of Statutes MMT

Date: August 6, 1992

Re: Summary of State, ex rel., v. Finney

State, ex rel., v. Finney, No. 67,622, filed July 10, 1992, is the Kansas Supreme Court case regarding gaming compacts between Indian tribes and the state of Kansas. The issue addressed in the case is whether the governor has authority to negotiate and enter a binding tribal-state compact on behalf of the state. The court notes that the case is based on the premise that the federal Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq., requires Kansas to negotiate gaming compacts. The court makes it clear that the case does not decide that question.

The court first reviews various Kansas and federal statutes and determines that there is no statute that grants the governor the power to enter binding tribal-state compacts. The court next looks to the state constitution to determine if it authorizes the governor to enter such compacts.

Under the constitutional principle of division of executive and legislative powers, the governor may not exercise legislative functions unless authorized by the constitution. The court therefore examines the compact in question to determine if it involves only executive functions or if it also involves legislative functions. In reviewing the compact, the court finds a number of provisions which are legislative in nature. Foremost are provisions for a state gaming agency, engrafted onto the existing Kansas lottery, and the delegation of rule and regulation authority to this agency. The court finds that these provisions operate as the enactment of new laws and amendments to existing laws, which is exclusively a legislative function. For this reason, the court concludes that, while the governor may negotiate compacts, she did not have the authority to bind the state to the terms of the compact in question without legislative authorization or legislative approval of the compact.

MEMORANDUM

Kansas Legislative Research Department

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August 6, 1992

To: Representative Marvin Barkis

From: Mary Galligan, Principal Analyst

Re: Indian Gambling

The following bills considered during the 1992 Legislative Session addressed the issue of Indian gambling. Only one of the bills, S.B. 233, passed the Legislature. That bill was vetoed by the Governor.

Two bills would have established procedures for negotiation of state-tribal gambling compacts under the Indian Gaming Regulatory Act (P.L. 100-497).

Bill No.: S.B. 739.

Sponsor: Elections.

Bill Summary: The bill, as amended by the Senate Judiciary Committee, would have established the Kansas Legislative Commission on State-Indian Affairs. The Commission would have been composed of: the President, Majority and Minority Leaders of the Senate; and the Speaker, Majority and Minority Leaders of the House. The Speaker and the President would have alternated as chair of the Commission. Staff support for the Commission would have been provided by existing legislative staff support agencies as authorized by the Legislative Coordinating Council.

The Commission would have been designated the representative of the state whenever the Legislature is not in session for the purpose of negotiating tribal-state compacts concerning gaming. (The bill did not designate a compact negotiating group when the Legislature is in session.) At the conclusion of negotiations, the Commission would have been required to present the final draft of the compact to the Legislature for approval or rejection. (The bill did not speak to the form in which compacts would be presented to the Legislature.) Any compact rejected would have had to be accompanied with a written statement of the Legislature's or Governor's objections. If time limits imposed by the Indian Gaming Regulatory Act (IGRA) would have been exceeded by submitting the compact to the Legislature, the compact would have been submitted to the Governor for approval or rejection. (The bill did not provide any formal role for the Governor in negotiation of compacts.) If either the Legislature or the Governor rejected the compact, the Commission would have had the power to modify the compact and resubmit it to the Governor or Legislature. The Governor or Legislature would only have had ten days to reject a compact presented by the Commission. In the case of an impasse, the bill would have provided that the Commission request

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the Governor to call a special session of the Legislature or initiate a petition to call a special session to consider the compact. The bill would have required that all compacts be signed by the Governor.

The only guidelines provided to the Commission by the bill would have been the following:

1. protection of the health, safety, and welfare of the citizens of Kansas;

2. inclusion of safeguards for the protection of the interests of the peoples of the Indian tribes and for the prevention of criminality or the potential for criminality in the operation of games; and

3. inclusion in the compact of only those activities permitted under Kansas law, to the extent allowed by federal law.

In addition to its duties under IGRA, the Commission would have been charged with coordinating and developing policies of the state for actions that jointly affect the Indian tribes of and other citizens of the state. The bill apparently envisioned relatively wide-ranging activities under that authority. The Commission would have been authorized to utilize the ". . . experience and counsel of the governor, the attorney general and other officers and employees of the executive branch of government having expertise in the areas of business and economic development, employment law enforcement, gaming, taxation and any other area deemed necessary . . . ."

The bill passed the Senate by a vote of 36 to 4. In the House the bill was referred to the Committee on Federal and State Affairs where it died at the end of the session.

Bill No.: H.B. 2928.

Sponsor: Federal and State Affairs.

Bill Summary: The bill would have authorized the Governor or the Governor's designated representative to negotiate, on behalf of the State, a tribal-state compact regarding class III gaming activities as provided under IGRA. The Governor also would have been authorized to sign such a compact on behalf of the state. (The bill did not make any provision for legislative involvement in the negotiation process nor did it provide for legislative review or approval of compacts prior to them becoming effective.) The bill would have designated the Attorney General to be legal counsel for the Governor during such negotiations. The Governor, or the Governor's designee and the Attorney General would have been required to report to the House and Senate standing committees on Federal and State Affairs on or before the first day of the regular legislative session each year. The required report would have contained information on compacts negotiated and an outline of prospective negotiations.

The only guidelines included in the bill were that any compact must include:

- a provision recognizing the right of each party to the compact, including the Legislature by concurrent resolution, to request that the compact be renegotiated or replaced by a new compact and providing terms under which either party, including the Legislature, could request renegotiation or the negotiation of a new compact; and

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- a provision that, in the event of a request for a renegotiation or a new compact, the existing compact will remain in effect until renegotiated or replaced.

The bill died in the House Committee on Federal and State Affairs at the end of the 1992 Session.

The bill was modeled after a Minnesota statute (3.9221). Research done by the Kansas Revisor of Statutes office during the 1992 Session revealed that the Minnesota law was developed as a means of clarifying who should negotiate state-tribal gambling compacts (which is not specified in the federal law), and of addressing whether the Legislature would have a role in the process. Delegation of this responsibility to the Governor was seen as a practical solution because of the time limits imposed by IGRA and because the Legislature is not continuously in session.

According to the information provided by the Revisor's office, in practice negotiations in Minnesota have been conducted by a committee composed of an attorney from the Attorney General's office who represents the Governor, a state senator, and a state representative. The committee makes recommendations which may be accepted, modified, or rejected by the Governor. NCSL reported that as of February, 1992, Minnesota had 11 Indian gambling compacts in place.

Bill No.: S.B. 233.

Sponsor: Winter, *et al.*

Bill Summary: The bill, as introduced, related to voluntary intoxication as a defense. That bill was amended by the House Judiciary Committee to address problems with statutes that refer to the Kansas Human Rights Commission.

As reported by the Conference Committee, the bill included provisions originally included in S.B. 521 which died at the end of the 1992 Session in the House Committee on Federal and State Affairs. S.B. 233 amended both those criminal statutes dealing with unlawful gambling and those statutes dealing with the powers of the Kansas Lottery Commission to limit the games that could be conducted by the Lottery. The bill provided that only instant lottery, keno, or lotto games conducted by the Lottery would have been permissible and that the Lottery's authority would have been limited to conducting those three types of games. Prior law did not restrict types of games the Lottery could conduct.

The bill was vetoed by the Governor. Her veto message described the bill as one ". . . which seeks, by statute, to restrict the constitutional rights of Indian people to engage in gaming activity in Kansas." The veto message also stated the Governor's objection to the bill as follows: "I object to the bill because it is flawed in that no Kansas Legislature has standing or right to deny by statute a constitutional opportunity adopted by vote of the people and because it inherently and unconscionably discriminates against Indian Nations and Indian people in Kansas."

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Bill No.: H.B. 2770.

Sponsor: Roy, *et al.*

Bill Summary: The bill would have prohibited any tribal-state compact governing gaming in Indian lands in Kansas from providing for gaming on lands that became Indian lands after December 31, 1991. Any compact that included such a provision would have been null and of no effect. The bill died in the House Committee on Federal and State Affairs at the end of the 1992 Legislative Session.

Bill No.: H.C.R. 5038

Sponsor: Roy, *et al.*

Bill Summary: The resolution would have urged the Secretary of the Interior to refrain from approving tribal-state gaming compacts entered without legislative approval. The bill died in the House Committee on Federal and State Affairs at the end of the 1992 Session.

92-3427/MKG

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MEMORANDUM

Kansas Legislative Research Department

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March 23, 1992
Revised September 17, 1992

RE: Indian Gaming Regulatory Act

On October 17, 1988 the Indian Gaming Regulatory Act (IGRA) was signed into law (P.L. 100-497, 25 U.S.C. 2701 *et seq.*). The Act creates a procedure for regulation of gaming on Indian lands. The statute establishes three classes of gaming, establishes the National Indian Gaming Commission to regulate class II gaming, and authorizes compacts between tribes and states for regulation of class III gaming.

Class I Gaming

Class I gaming includes social or traditional games played in connection with tribal ceremonies or celebrations. Under IGRA, class I gaming is regulated exclusively by tribes.

Class II Gaming

Class II gaming includes bingo and, if played at the same location as bingo, pull tabs, lotto, punch boards, tip jars, and instant bingo. The National Indian Gaming Commission's proposed regulations that defined a number of terms used in the IGRA generated considerable discussion regarding some forms of gambling that might be considered to be either class II or class III. The term "lotto" was one over which there was some controversy. The Commission's decision was to adopt a definition that essentially makes lotto synonymous with bingo. In reaching that conclusion the Commission relied in part on a decision by the U.S. Circuit Court for the Seventh Circuit in *Oneida Tribe of Indians v. State of Wisconsin* (951 F.2d 757 (7th Cir. 1991)). In that decision the court held that "lotto" as used in IGRA is the common meaning published in dictionaries, *i.e.,* "a game of chance played on a bingo-like card in a bingo-like setting following bingo-like procedures. It does not mean lottery in general or the type of lottery operated by various states and denominated 'Lotto' or some derivative thereof." (Quoted by the National Indian Gaming Commission at F.R. Vol. 57, No. 69, 12382.) Class II gaming also includes card games authorized by state law or not explicitly prohibited by state law and played at any location in the state. Class II card games must be played in conformity with state law or regulations regarding hours of operation and pot limits. Class II

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gaming specifically does not include banking card games (*e.g.*, baccarat, chemin de fer, or blackjack), or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

A tribe may engage in class II gaming if the state in which the tribe is located permits such gaming for any purpose by any person, organization, or entity. Class II gaming is regulated by the National Indian Gaming Commission and the tribe, or solely by the tribe if it is issued a certificate of self-regulation.

Class III Gaming

Class III gaming includes all gaming not included in classes I or II, such as casino-type games, gambling devices, and parimutuel wagering. Class III gaming is prohibited unless authorized by a tribal-state compact.

Commission regulations that define certain terms used in the IGRA include among Class III games any house banking game (a game in which players compete against the house rather than against one another); casino games such as roulette and keno, slot machines as defined in the Johnson Act (15 U.S.C. 117(a)(1)) and electronic or electromechanical facsimiles of any game of chance; any sports betting or parimutuel wagering; or lotteries.

The classification of keno as a class III game also generated some controversy among persons who commented on the Commission's proposed definitions. The Commission's response was to state that ". . . keno is a class III game because it is a house banking game and is not won by the first person covering a previously designated arrangement of numbers." (F.R. Vol. 57, No. 69, 12383). The Commission also included in its definition of class III games a number of games that at least nominally, combine aspects of bingo and traditional casino games, such as bingojack (bingo and blackjack) and bingolet (bingo and roulette).

Tribal-State Compacts

Class III gaming is lawful on Indian lands when: authorized by a tribal ordinance approved by the chair of the Commission; located in a state that permits such gaming for any purpose; and conducted in conformance with a tribal-state compact that has been approved by the Secretary of Interior.

The IGRA authorizes an Indian tribe and the state in which the tribe is located to enter into a compact governing gaming activities. The compact may include provisions concerning:

- the application of tribal or state criminal and civil laws directly related to gaming;
- the allocation of jurisdiction between the state and the tribe;
- state assessments to defray the costs of regulating the activity;

- taxation of gaming by the tribe in amounts comparable to state taxation of similar activities;
- remedies for breach of contract;
- standards for the operation and maintenance of the gaming facility; and
- any other subjects related to the gaming activity.

The state is not authorized to impose a tax, fee, charge, or other assessment (except as agreed to in the compact to defray the state's cost of regulating the gaming activity) upon a tribe or person authorized by a tribe to conduct a gaming activity. The state cannot refuse to renegotiate a compact based on its inability to impose a tax, fee, or other assessment.

Federal district courts have jurisdiction over:

- actions by Indian tribes arising from the failure of a state to negotiate with a tribe seeking to enter a compact or to negotiate in good faith; and
- any action by a state or tribe to enjoin a class III activity which violates the tribal-state compact.

A tribe may initiate an action for failure to negotiate in good faith against a state only after the passage of 180 days from the date the tribe requested the state to enter negotiations for a compact. If the court finds that the state has failed to negotiate in good faith, it shall order the state and the tribe to conclude a compact within 60 days. If the state and the tribe fail to conclude a compact within the 60-day period, the parties are to submit to a court-appointed mediator their last best offers for a compact. The mediator must then choose the compact that best conforms with federal law and the decision of the court. If the state consents to the compact selected by the mediator within 60 days, that compact becomes binding on the state and the tribe. If the state does not consent to the mediator-selected compact within 60 days, the Secretary of Interior is required to prescribe, in consultation with the tribe, procedures for the conduct of gaming on Indian lands consistent with the compact selected by the mediator, the IGRA, and relevant state law.

The Secretary of the Interior is authorized to approve tribal-state compacts. The Secretary may disapprove a compact only if it violates:

- the IGRA;
- any other federal law that does not relate specifically to jurisdiction over Indian gaming; or
- the trust obligations of the United States to Indians.

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Gaming on Indian Lands

Gaming is prohibited on land acquired by the Secretary in trust for a tribe after the date of enactment of the Act unless:

- the land is within or contiguous to the tribe's existing reservation boundaries; or
- the tribe had no reservation on October 17, 1988, and
  - such lands are located in Oklahoma and
    - are within the boundaries of the tribe's former reservation, as defined by the Secretary, or
    - are contiguous to other land held in trust or restricted status by the United States for the tribe in Oklahoma; or
  - such lands are located in a state other than Oklahoma and are within the tribe's last recognized reservation within the state or states within which such tribe is presently located.

This prohibition does not apply if the Secretary determines that a gaming facility would be in the best interests of the tribe and its members and would not be detrimental to the local community and the Governor if the state concurs with the Secretary's determination. The prohibition also does not apply to lands:

- taken in trust as part of a settlement of a land claim;
- comprising the initial reservation of a tribe federally acknowledged; or
- restored to a tribe that has been restored to federal recognition.

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OFFICE OF
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To: Legislative Coordinating Council
From: Mary Torrence
Date: September 9, 1992
Re: Indian Gaming Case Law

WHEN MAY A STATE PROHIBIT OR REGULATE GAMING ON INDIAN LANDS?

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 94 L.Ed.2nd 244, 107 S.Ct.1083 (1987)

In the Cabazon case, decided before enactment of the Indian Gaming Regulatory Act (IGRA), the issue was whether state restrictions on bingo applied to bingo operations on Indian reservations. California had general criminal jurisdiction over Indian land. The state operated a lottery and permitted bingo and parimutuel wagering on horse races. Violations of restrictions on gambling were crimes. Because California permitted bingo and other forms of gambling, the court determined that the state regulated, rather than prohibited, gambling. Based on that distinction, the court found California gambling statutes to be civil regulatory rather than criminal prohibitory. Therefore the states's criminal jurisdiction on Indian land did not include jurisdiction over bingo operations on those lands.

Mashantucket Pequot Tribe v. State of Connecticut, 737 F. Supp. 169 (D. Conn. 1990); aff'd 913 F.2d 1024 (2nd Cir. 1990); cert. denied

In this case, the Indian tribe sought to negotiate for casino gambling on its lands. The state allowed operation of limited casino-type games by nonprofit organizations for charitable purposes. The court applied the civil regulatory/criminal prohibitory standard in determining that the state could not apply its restrictions to casinos on Indian lands. The court also held that failure to begin negotiations of a compact within the 180 days provided by IGRA is failure to negotiate in good faith, even if the delay is due to the state's desire to first resolve legal issues.

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WHAT IS CLASS III GAMING?

Oneida Tribe of Indians v. Wisconsin, 742 F.Supp. 1033 (W.D. Wis. 1990); aff'd 951 F.2d 757 (7th Cir. 1991)

IGRA describes class II gaming as bingo and "(if played in the same location) pull tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo". The Oneida Tribe maintained that its "lotto" game, similar to states' "Lotto" games, was class II gaming that could be conducted without a tribal-state compact. The Seventh Circuit Court of Appeals held that "lotto", as used in IGRA, was essentially the same as bingo and that it did not include games such as state-operated "Lotto". Therefore the tribe's lotto game was class III gaming for which a compact is required.

Spokane Tribe of Indians v. U.S., 782 F.Supp. 520 (E.D. Wash. 1991); aff'd 1992 W.L. 190289 (9th Cir., Aug.12, 1992)

The Spokane Tribe sought a determination that its "lotto" machines were class II gaming devices, exempt from state regulation. The game played on these machines was similar to that in the Oneida case. The court concluded that the game was class III gaming, both for the reasons stated in Oneida and because IGRA classifies all electronic games of chance as class III gaming.

IF A STATE PERMITS ONE TYPE OF CLASS III GAMING, ARE ALL TYPES OF CLASS III GAMING SUBJECTS OF COMPACT NEGOTIATION?

Lac du Flambeau Indians v. State of Wisconsin, 770 F.Supp. 480 (W.D. Wis. 1991)

The Lac du Flambeau case involves a situation very similar to that in Kansas. Originally all lotteries were prohibited by the Wisconsin Constitution, but constitutional amendments were passed to allow a state lottery, bingo, raffles and parimutuel wagering on dog, horse and snowmobile races. The state contended that authorization of a state lottery was intended to allow games requiring tickets, even though the constitution referred only to a state "lottery". The court found that the term "lottery" had always been interpreted to include all forms of gambling. The court applied the civil regulatory/criminal prohibitory standard and concluded that the state must negotiate "any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law".

The state's appeal of the decision was dismissed on technical grounds. The state has petitioned for certiorari.

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Sycuan Band of Mission Indians v. Roache, 788 F.Supp. 1498 (S.D. Cal. 1992)

Indian tribes in this case sought an injunction of prosecutions for violations of state statutes prohibiting slot machines. The state in most instances prohibited such machines and argued that the focus of the court's analysis should be the specific statute in question rather than the state's gambling laws as a whole. The court instead looked at the state's overall gambling policy and found that the state permitted, encouraged and benefitted from gambling. The court therefore held that the slot machine prohibition was civil regulatory and that the state had no jurisdiction to enforce the law on tribal lands. In reaching its decision, the court noted that it was bound by decision of the Ninth Circuit Court of Appeals to protect Indian sovereignty by resolving any doubts in favor of the Indians.

CAN A STATE BE FORCED TO NEGOTIATE A COMPACT UNDER IGRA?

Poarch Band of Creek Indians v. State of Alabama, 776 F.Supp. 550 (S.D. Ala. 1991) and 784 F.Supp. 1549 (S.D. 1992)

The Poarch Band filed suit under IGRA to require the state to negotiate a compact. The state asserted that the state's sovereign immunity under the 11th Amendment to the U.S. Constitution was abrogated by the provision of IGRA that authorizes such suits. The court held that Congress could not constitutionally require the state to submit to such suits without the state's consent. The court further held that individual state officers could not be sued in lieu of the state because (1) negotiation is a discretionary act which the court cannot order an official to take and (2) the suit against the officers would in reality be a suit against the state. The tribe is appealing the decision.

Spokane Tribe of Indians v. State of Washington, 790 F.Supp. 1057 (E.D. Wash. 1991)

In this action, the Spokane Tribe sought to require the state to negotiate a gaming compact. The state asserted the 11th Amendment as a defense. The court agreed but held that the court could exercise its jurisdiction over individual state officers. In arriving at its decision, the court balanced the concern over directing officials to perform discretionary acts versus the total lack of a forum for the tribe's grievance.

Both the tribe and the state are appealing the decision.

MEMORANDUM

Kansas Legislative Research Department

Room 545-N -- Statehouse
Topeka, Kansas 66612-1586
(913) 296-3181

August 6, 1992

Re: Indian Gambling Compacts

Below is a list of possible policy guidelines that might be included in a statute regarding negotiation of tribal/state gaming compacts under the Indian Gaming Regulatory Act. Such a list might be included in 1992 H.B. 2928. A statute might enumerate certain provisions that must be included in any compact. Some examples are:

- a requirement that a compact only permit those games currently regulated in the state and that the compact be renegotiated in the event of statutory or constitutional change regarding regulation or prohibition of any game;

- a requirement that any compact include an enumeration of the specific class III games that may be conducted under the compact;

- a requirement that the compact preclude gambling by persons under a certain age;

- a requirement that specific game rules be included as part of the compact and a provision for amending the compact when those rules change;

- a requirement that compacts address a variety of security matters, including audits, staffing, individual game security, staff training, duties of the tribe to enforce internal security requirements, and ability for state law enforcement to also enforce and monitor security;

- a requirement that rules and odds of winning be displayed or available to the public in a gambling facility;

- a requirement that the compact include a method for resolving disputes between the state and tribal gaming agencies;

- a requirement that the compact delineate the division of responsibilities between tribal and state gaming agencies in regard to enforcement of the compact including access to the gaming facility and its records;

- a requirement that the compact include a delineation of responsibilities between the state and the tribe regarding criminal jurisdiction under the compact;

- a requirement that the compact contain an enumeration of all standards and requirements to obtain a license from or contract with the tribe to operate, manage, or conduct gambling activities covered by the compact;

- a requirement that all compacts provide for KBI background investigations of all gaming employees, contractors, and licensees of the tribe prior to and during the contract/license period and during employment;

- a requirement that all compacts prohibit hiring of or contracting with felons or persons convicted of gambling offenses;

- a requirement that the state be reimbursed by the tribe for any and all expenses incurred in connection with enforcement and administration of the state's obligations under the compact;

- a requirement that specific duties and responsibilities of the Tribal Gaming Agency be enumerated in the compact;

- a requirement that any facility housing activities included in a compact adhere to specific building, fire, and safety codes; and

- a requirement that any compact include a stipulation that the tribe will withhold state income tax from winnings of non-Indians.

A statute that speaks to negotiation and content of compacts with American Indian tribes might also address procedural matters such as:

- a description of the process for state acceptance or ratification of the compact, *e.g.*, the Governor's signature, a concurrent resolution adopted by the Legislature, or a bill placing the compact in statute;

- a requirement that the state hold public hearings before, during, or after an agreement has been reached on a compact (one might consider requiring that hearings be held in the area or areas that would be impacted by development associated with the gambling activity);

- designation or creation of a state gaming agency and enumeration of its powers and duties (this matter might be critical because the agency would be charged with regulation and enforcement of the compact which is neither promotion and operation which the Lottery currently does, nor exactly licensure and regulation which is what the Racing Commission does; the function might be closer to a combination of the regulatory functions of the Racing Commission and the investigatory functions of the KBI);

- designation of the state representative in any dispute arising under the compact; and

- a revocation/renegotiation procedure including a general timeline for renegoatiations (H.B. 2928 includes language that would partly address this issue).

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While this list is not exhaustive, it includes many issues addressed in the compact between Kansas and the Kickapoo Tribe. Since hardly any states currently delineate in statute how compacts are negotiated, or matters that must be addressed or included in a compact, it is difficult to predict whether some policy statements that might be included in such a list would be allowed by courts if challenged. For example, since the Indian Gaming Regulatory Act includes procedures for acquisition of land by tribes specifically for gambling purposes, any state-imposed restrictions on the location of gambling activities might be challenged in court.

Some states do address in statute matters that must be included in a compact. The Iowa law simply states that "the agreements or compacts shall contain provisions intended to implement the policies and objectives of the Indian Gaming Regulatory Act." Minnesota also refers to the federal law and includes the federally-defined time limitations in its negotiation statute. Minnesota law contains a renegotiation provision essentially the same as the one in H.B. 2928. California has designated in statute the state Horse Racing Board as the entity responsible for negotiating compacts under the IGRA. California's statutes apparently do not address the issue in any other way. A Wisconsin statute simply states that "the governor may, on behalf of this state, enter into any compact that has been negotiated under [IGRA]."

North Dakota, which has a significantly larger American Indian population and more reservations within its borders than Kansas, has a relatively detailed statute that addresses agreements between public agencies and Indian tribes. Clearly, some of its provisions would not be applicable to state-tribal gambling compacts, but some matters like public notice of the agreement and the hearing requirement might be applicable to negotiation of compacts.

MEMORANDUM

Kansas Legislative Research Department

Room 545-N – Statehouse
Topeka, Kansas 66612-1586
(913) 296-3181

April 10, 1992
Revised September 4, 1992

To: House Committee on Federal and State Affairs

Re: Tribal-State Gaming Compacts -- Negotiating Authorization

The following states have enacted statutes to authorize certain parties to negotiate gaming compacts or other compacts which may encompass gaming activities.

Iowa

Iowa statute 10A.104 authorizes the Director of Inspections and Appeals (not comparable to any Kansas officer) to enter into and implement gaming compacts. There appear to be no other statutory provisions.

Minnesota

Minnesota statute 3.9221 provides for the Governor or the Governor's representatives to negotiate gaming compacts. The Attorney General serves as counsel for the Governor or Governor's representatives. The Governor, Attorney General, and Governor's representatives report to the Legislature semi-annually regarding compacts negotiated and prospective negotiations. The Legislature may, by joint resolution, request that an agreement be renegotiated or replaced by a new compact.

North Dakota

North Dakota statutes 54-40.2-01 *et seq.,* regarding tribal-state compacts do not appear to be applicable to gaming compacts. State agencies are authorized to enter into agreements with tribes but each agreement is subject to approval of the Governor.

South Dakota

South Dakota statute 1-4-25 requires the Governor or the Governor's designee to hold public hearings before entering into a gaming compact.

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Wisconsin

Wisconsin statute 14.035 authorizes the Governor to enter into gaming compacts on behalf of the state.

Louisiana

Louisiana statute 46:2301 established the Governor's Commission on Indian Affairs. A bill enacted in 1990 authorized the Governor to appoint an Indian Gaming Commission (separate from the Governor's Commission on Indian Affairs which has negotiated nongaming compacts). The Indian Gaming Commission is composed of five members appointed by the Governor, who serve at the pleasure of the Governor. (The members appointed by the previous Governor included two legislators, as well as staff representation from the Governor's Commission on Indian Affairs.)

Colorado

Colorado statutes 12-47.2-101 *et seq* authorize the Governor to negotiate tribal-state compacts after consulting with the Colorado Limited Gaming Control Commission in the Division of Gaming. The Commission is composed of five members appointed by the Governor and approved by the Senate.

Provisions of the compact are specified in statute.

California

California statute 19445 authorizes the California Horse Racing Board to negotiate with an Indian tribe on any compact concerning horse racing. Although there is no similar statutory provision, the Governor's office has delegated to the California Attorney General's office the authority to negotiate with tribes regarding other types of gambling, such as casinos and lotteries.

Oklahoma

Although not specifically addressing gaming compacts, Oklahoma statutes 1221 *et seq.*, authorize the Governor or designee to negotiate and enter into Indian compacts. Prior to becoming effective, such agreements must be approved by the Joint Committee on State-Tribal Relations composed of five members of the Senate and five members of the House of Representatives. A provision in the statutes also prohibits gaming on private land sold to Northeast Eight Intertribal Council (see 74-1225).

Montana

Montana statutes 18-11-101 *et seq.*, authorize public agencies to enter into agreements with tribes. Like Oklahoma's statutes, Montana's statutes do not specifically address gaming compacts. Prior to becoming effective, the agreement must be approved by the Attorney General.

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Washington

April 1, 1992 a new statute went into effect that delegated authority to negotiate compacts under the Indian Gaming Regulatory Act to the Washington State Gambling Commission (L. 1992 Ch. 172). The Commission is composed of five members appointed by the Governor and confirmed by the Senate. In addition, there are four *ex officio* legislative members, one from each party of the House and Senate appointed by the Speaker and the President. Legislative members are permitted by the new statute to vote on tribal-state gambling compacts, but are not permitted to vote on other matters that come before the Commission.

The Commission, through its Director, or the Director's designee, is to negotiate compacts on behalf of the state. When a tentative agreement is reached on a compact, the director must transmit a copy to the Commission and to two standing legislative committees, one designated by the President of the Senate and the other designated by the Speaker of the House. Those committees must conduct hearings on compacts forwarded to them by the Director within 30 days of receipt. The Commission also may hold public hearings on compacts.

Within 45 days of receiving a compact from the Director, the Commission, including the legislative members must vote on whether to return the compact to the Director with instructions for further negotiation, or to forward the proposed compact to the Governor for review and final execution.

The statute provides for an extension of those deadlines from 30 to 45 days and from 45 to 60 days if a compact is sent to the Commission and committees during or within ten days of the beginning of a regular legislative session or during a special legislative session.

The Commission, consistent with the terms of any compact, is specifically authorized to enforce provisions of any compact executed.

The statute that enumerates the powers and duties of the Governor also was amended by the bill. The new provision authorizes the Governor to execute those compacts forwarded to the Governor in compliance with the act.

Much of the information included in this memorandum was furnished by the Office of the Revisor of Statutes.

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SECRETARY—LEGISLATIVE COORDINATING COUNCIL
SECRETARY—KANSAS COMMISSION ON INTERSTATE COOPERATION
KANSAS STATUTES ANNOTATED EDITING AND PUBLICATION
LEGISLATIVE INFORMATION SYSTEM

To: Legislative Coordinating Council

From: Mary Torrence, Assistant Revisor of Statutes

Date: October 8, 1992

Re: Indian Gaming Compacts--Procedures for Negotiation and Execution

States have adopted various procedures for negotiating and entering tribal-state gaming compacts. The following are options for your consideration in establishing a procedure for the state of Kansas. The options are based on procedures set out in statutes and compacts of Arizona, California, Colorado, Iowa, Minnesota, Nebraska, Oklahoma, South Dakota, Washington and Wisconsin.

I. Establish policy regarding gambling

A. Maintain clean industry

B. Protect current gambling revenues

1. State

2. Nonprofits

3. Others

C. Economic development

II. Designate a negotiator

A. Executive officer or agency

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1. Governor or governor's representatives
2. Department of Revenue
3. Kansas Lottery
4. Kansas Racing Commission

B. Negotiating team composed of various interests

III. Address specific provisions

A. Regulation of gambling, adoption of rules and regulations, enforcement of compact

1. Designate and authorize existing agency to regulate
2. Create new agency to regulate
3. Designate tribe to regulate

B. Reimbursement of state and/or local expenses

1. Regulation
2. Enforcement
3. Services

C. Allocation of civil and criminal jurisdiction

D. Remedies for breach of compact

E. Term of compacts; extension; renegotiation

IV. Provide for hearing on proposed compact

A. By negotiator

B. By legislature

V. Provide for execution

A. By negotiator

1. Legislation is not needed in order to implement
2. Effective only on enactment of needed legislation

B. Legislative ratification

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1. Governor or governor's representatives
2. Department of Revenue
3. Kansas Lottery
4. Kansas Racing Commission

B. Negotiating team composed of various interests

III. Address specific provisions

A. Regulation of gambling, adoption of rules and regulations, enforcement of compact

1. Designate and authorize existing agency to regulate
2. Create new agency to regulate
3. Designate tribe to regulate

B. Reimbursement of state and/or local expenses

1. Regulation
2. Enforcement
3. Services

C. Allocation of civil and criminal jurisdiction

D. Remedies for breach of compact

E. Term of compacts; extension; renegotiation

IV. Provide for hearing on proposed compact

A. By negotiator

B. By legislature

V. Provide for execution

A. By negotiator

1. Legislation is not needed in order to implement
2. Effective only on enactment of needed legislation

B. Legislative ratification

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STATE LEGISLATIVE REPORT

July 1992 Vol. 17, No. 16

States and the Indian Gaming Regulatory Act

By
Pam Greenberg
Policy Specialist
and
Judy Zelio
Policy Associate

Indian tribes and states together face new legal, social and economic challenges with the recent appearance of casino gambling and other high-stakes gaming on Indian lands. A number of tribes, believing that gambling is a powerful tool for quickly achieving economic self-sufficiency, have plunged into various high-stakes activities that are considered illegal under the laws of the states in which their lands lie. Some states' officials have challenged the tribes' right to do so. Generally, state laws are not enforceable on Indian lands without congressional authorization and/or tribal consent. A federal law called the Indian Gaming Regulatory Act of 1988 (IGRA) purports to offer a solution to this state-tribal jurisdictional and legal dilemma by outlining a process through which states and tribes may reach agreement about Indian gaming. Under IGRA's compacting process, the states can agree to tribal high-stakes casino gambling without consenting to similar activities on nontribal lands. Some states have chosen this route, while others have resisted this apparent contradiction in state policy.

Indian tribal gaming thus has moved to the forefront in debates over where, what kind, and how much gambling will take place in the states. Tribes finally have found a moneymaking activity that may significantly improve living conditions for their members (and other nearby community members as well), at least in the short run. But state law enforcement officials, concerned about criminal activities, want a role in Indian gaming regulation. State revenue departments would like to tap into the flow of spending on gambling. Other officials wish to limit Indian gaming to avoid saturating the finite gambling market. And state lawmakers want to ensure that the prevailing state gambling climate is what they intended it to be.

This report outlines the rights and responsibilities of states and tribes under IGRA, and describes some of the activities that have taken place since its passage. First, the report discusses state-tribal relations under IGRA. It outlines events leading up to passage of IGRA in 1988. Next, it describes the act, including its history and purpose, but focuses on provisions of particular interest to state legislatures. The report then discusses judicial interpretations of the act. Last, it describes some state experiences in implementing the act.

Background

The federal government has a historical and legal trust responsibility to Indian tribes as "domestic dependent nations" to ensure that their economic endeavors are supported, and that their interests and assets are protected and managed appropriately. With the intention, then, to encourage badly needed economic development on Indian tribal lands and to respond to the interest of tribes in using gambling activities for that purpose, Congress in 1988 adopted a new law—the Indian Gaming Regulatory Act (IGRA).

Under IGRA, a presidential commission was given the responsibility to oversee Indian gaming. In addition, IGRA attempted to recognize the existing state role in gaming regulation by dividing Indian gaming into three classes. Two classes of Indian gaming fall under Indian and federal control. The third, "Class III," or casino-style, gaming is acknowledged to be a state-tribal issue. IGRA requires states and tribes to negotiate compacts establishing the rules by which Class III gaming on tribal lands will be conducted. The secretary of interior has final authority to approve the state-tribal agreements. Thus IGRA outlines a way for states and tribes, as sovereign

An Information Service of the National Conference of State Legislatures
1560 Broadway, Suite 700, Denver, Colorado 80202. William T. Pound, Executive Director

ies, to settle questions about . regulation on Indian .s of certain types of the most sophisticated gaming. But the act's ambiguities and its contradictions with state policies have created a legal atmosphere so uncertain that good relationships between states and tribes are being seriously compromised. Those relationships may be damaged well into the future.

IGRA creates very real questions about who makes state public policy decisions—in particular, gaming policy. Thirty-four states now operate lotteries, and nine states allow some form of commercial casino gambling. Many states allow charitable organizations to hold occasional "casino nights" as fund raisers. Yet high-stakes casino gambling has not been approved by the legislatures of most states.

The effect of IGRA, if not its intent, has been to invite individual Indian tribes, operating as sovereign governments, to undertake commercial gambling activities that until recently had taken place only in Nevada and New Jersey, where they were conducted under careful state regulation. Now those activities theoretically can be undertaken in any state in which tribal lands are found, even if state policy does not permit such gaming. To date, court decisions on state challenges to tribal gaming have said only that tribes may not engage in gaming activities that states specifically prohibit by law. In general, a tribe may engage in Class III gaming in any state that allows such gaming in any form, but a state-tribal compact must be in place before the tribe can proceed with it. Otherwise, the tribe will be in violation of federal law.

As legislators across the country increasingly approve various forms of gambling, they do so with the expectation that the states will have a role in the regulation and oversight of gaming activities within state boundaries. But because tribal high-stakes casino gambling allowed under IGRA, and so far supported by court decisions, is not subject to state control except as agreed to in compacts, tribal gambling activities beyond the scope permitted to nontribal entities elsewhere in a state present a challenge to lawmakers who consider high-stakes casino gambling to be contrary to the public interest.

Legislative reaction to the policymaking challenge has been slow, although some lawmakers have begun to seek ways to stop further expansion of Indian gaming by enacting state legislation. They usually find themselves stymied with this approach, however, for at least two reasons. First, state laws do not apply on tribal lands. Second, because existing state laws do in fact allow gambling rather than prohibit it, tribes are permitted to proceed with similar forms of gaming. Consequently, legislatures have had little involvement other than, in some cases, the enactment of laws that grant governors the authority to negotiate and sign compacts.

So far, governors have assumed the role of "the state" in the negotiation process. (IGRA is unclear about the definition of "the state.") States and tribes in nine states have negotiated and signed at least 50 compacts and the secretary of the interior has approved them. (See Figure 1 and Appendix A on page 11.) Many more compact negotiations have stalled or fallen into litigation.

In fact, states . . tribes seem to be approaching a ue, due largely to IGRA's lack of clarity. Tribes, given . go-ahead under IGRA to sue states for failure to negotiate or failure to negotiate "in good faith," have taken states to court for lack of good faith when negotiations bogged down. IGRA's definition of good faith is vague, except for a provision that says an attempt by states to tax tribal gaming revenues would be considered a lack of good faith. Some states have resorted to defending themselves from these tribal suits by invoking the 11th Amendment of the Constitution, leaving tribes without recourse to force further negotiations.

Negotiating the conduct of tribal gambling activities under IGRA provides states and tribes with a significant opportunity to identify and cooperate on matters of common concern that affect residents in communities where gambling takes place, but IGRA's parameters are still being tested.

Significant Events Prior to Passage of the Indian Gaming Regulatory Act

In 1979 the Seminole tribe of Florida opened a high-stakes bingo game on tribal land. At that time, state and federal law enforcement officials stressed the need for federal or state regulation of gaming, in addition to (or instead of) tribal self-regulation. They feared that Indian bingo and other gambling enterprises would be infiltrated by criminals.

The Seminole tribe resisted Florida's attempts to assert jurisdiction over the tribe's gaming activities. The 5th U.S. Circuit Court held in 1981 that the Seminole tribe could conduct bingo without state interference because the federal government had never transferred jurisdiction to the state allowing it to impose civil laws on Indian lands.[1]

The court's decision referred to a federal law (Public Law 83-280) that authorized the transfer of *criminal* jurisdiction over Indians and Indian lands from the federal government to those state governments that chose to assert such jurisdiction, while leaving tribes free to continue the exercise of *civil* jurisdiction over their members and their lands. On the West Coast, California and Riverside County sought to apply to an Indian band their statutes and ordinances governing gambling activities. But in 1987, the U.S. Supreme Court ruled that California's civil laws and regulations pertaining to bingo and certain card games could not be applied to such activities on Indian reservations.[2]

Passage of the Indian Gaming Regulatory Act

Development of the Act

Congressional consideration of Indian gaming legislation began in the 98th Congress in 1984 with the introduction of several bills and the conduct of hearings, but no further action was taken by either the Senate or the House. In 1985, five bills were introduced in the House to provide a federal role in the oversight of gaming on Indian lands. The administration had no legislative proposal of its own to offer at that time. In November 1985, representatives of the Department of the Interior and the Department of Justice testified to Congress in support of tribal bingo regulated by a federal agency. Their testimony also opposed "high-stakes" gaming unless conducted under state jurisdiction.

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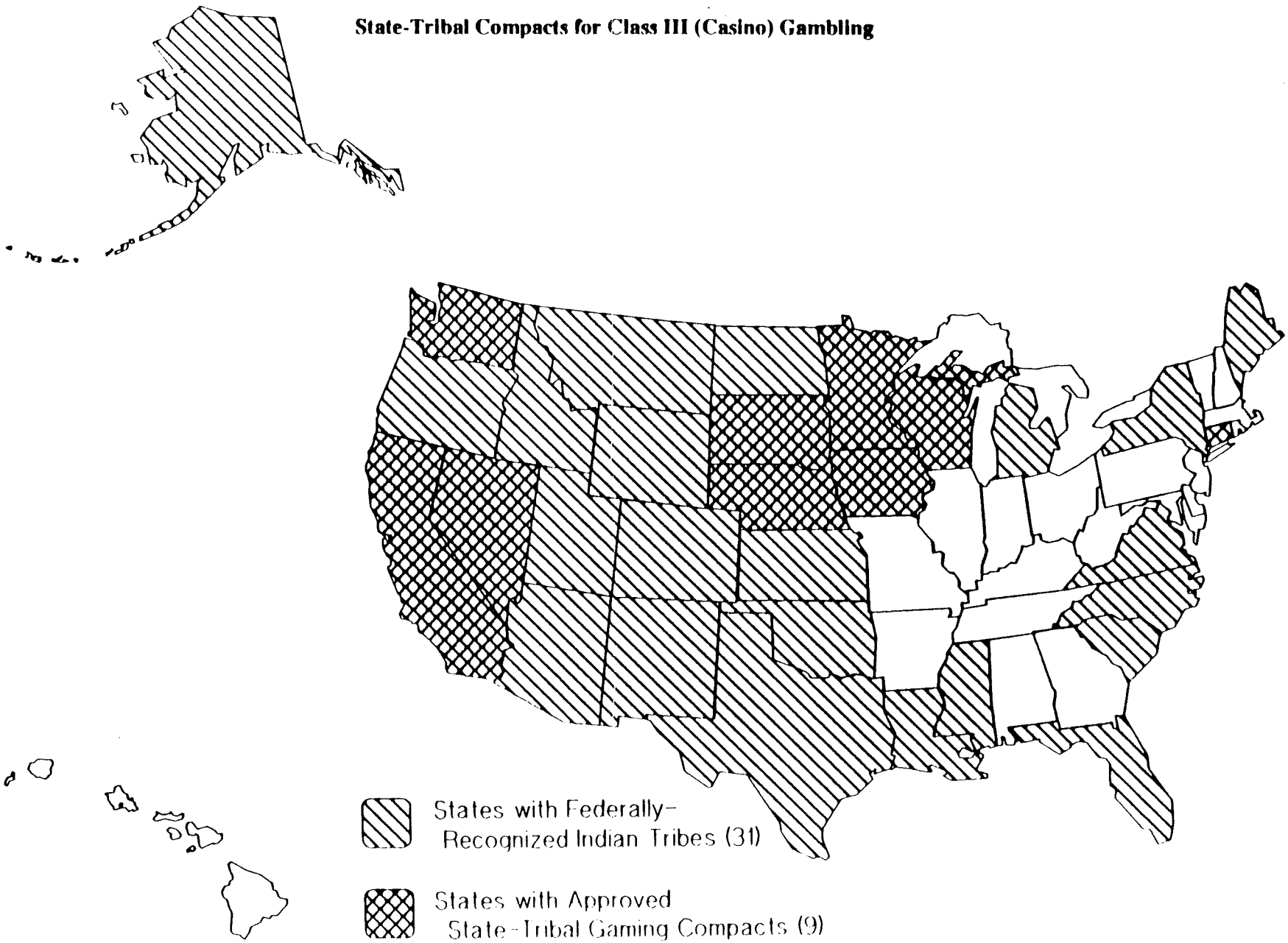
Figure 1

State-Tribal Compacts for Class III (Casino) Gambling



Following several years of discussions and negotiations between gaming tribes, states, the gaming industry, the administration and the Congress regarding a system for regulating gaming on Indian lands, the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq., became effective October 17, 1988. Discussions had focused on how to preserve the right of tribes to self-government while protecting both the tribes and the gaming public from unscrupulous people. The new act addressed those issues directly.

Purpose of the Act

Congress enacted IGRA in an attempt to establish a regulatory structure that balances the rights of states and tribes—states' rights to maintain public health and safety and tribes' rights to promote economic development, self-sufficiency and strong tribal governments. Congress also hoped to shield tribes from organized crime and other corrupting influences, to ensure that Indian tribes are the primary beneficiary of gaming operations and to ensure that gaming is conducted fairly and honestly by both the operator and players.

Provisions of the Indian Gaming Regulatory Act

IGRA provides a gaming regulatory scheme that attempts to address the sovereign rights of both states and tribes. It creates a gaming classification system that defines tribal gaming over which tribes have exclusive jurisdiction, tribal gaming which the federal government itself will oversee, and tribal gaming in which states may have significant regulatory involvement under a state-tribal compact. Because of the third gaming class, IGRA has, and will continue to have, an important effect on state gaming policy.

IGRA created a three-member National Indian Gaming Commission within the Department of Interior to implement and oversee provisions of the act. IGRA outlines the staffing, powers and responsibilities of the commission. The commission is made up of a chairman appointed by the president and two commissioners. Two of the three must be Native American. The first chairman, Anthony Hope, was appointed by President Bush in June 1990. The commission began functioning in April 1991, when the third commissioner was appointed. The two commissioners are Joel M. Frank (Seminole) and Jana McKeag (Cherokee).

IGRA classifies gaming into three types and establishes a regulatory scheme for gaming activities conducted by tribes.

Class I Gaming

IGRA describes Class I gaming as "social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in as a part of, or in connection with, tribal ceremonies or celebrations."[3] Class I gaming is under the exclusive jurisdiction of Indian tribes and is not subject to any provision of IGRA. The Senate committee report that accompanied the act explains, "The committee was hesitant to attempt to define traditional or ceremonial gaming as it is clearly an area of tribal self-government."[4]

Class II Gaming

IGRA defines Class II gaming as "the game of chance commonly known as bingo . . . including (if played in the same location) pull tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo." IGRA also includes games conducted with "electronic, computer or other technologic aids" as Class II gaming.[5] But the act excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" from Class II gaming.[6]

Nonbanking card games are permissible under Class II gaming, unless they are explicitly prohibited by state law. "Banking card games" are described in the Senate committee report that accompanied the act as "those games where players play against the house and the house acts as banker" versus "non-banking card games" where players play against each other.[7]

Class II gaming is under extensive tribal jurisdiction, but is subject to provisions of IGRA and oversight regulation by the National Indian Gaming Commission. Class II gaming is not subject to state regulation.

Tribes and states have expressed differing interpretations of IGRA's definition of Class II gaming. Court decisions have clarified some provisions, and the National Indian Gaming Commission issued regulations clarifying several definitions.

In *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, the tribe filed suit alleging that the state had failed to negotiate in good faith for a Class III gaming compact.[8] The Oneida tribe operates a "lotto" game that is essentially identical to the lotto game offered by the Wisconsin state lottery. The 7th U.S. Circuit Court held that the term "lotto" is synonymous with "bingo," and does not mean "lottery" in general or the type of lottery operated by various states; thus, the lotto game operated by the Oneida tribe should be classified as Class II gaming rather than Class III. Other cases have further defined Class II and Class III gaming.

The National Indian Gaming Commission, in regulations published on April 9, 1992, clarified several definitions. In particular, it specifically excluded the games known as "keno" and "bingojack" from Class II gaming. It reinforced the definition of lotto determined in the *Oneida* case. The commission also specified that games such as video bingo, in which a single player plays a game with or against a machine rather than with or against other players, are Class III gaming, not Class II.

Class III Gaming

IGRA designates Class III gaming as all other types of gambling, including banking card games (e.g., baccarat, chemin de fer or blackjack), slot machines, pari-mutuel racing, and jai alai. Electronic games of chance, such as video poker, are also considered Class III gaming.

Tribes are prohibited from conducting Class III gaming unless they enter into a compact with the state for the operation of such games. IGRA requires that tribes seeking to operate Class III gaming first request the state to enter into negotiations for a tribal-state gaming compact.

IGRA requires states to negotiate with tribes in good faith, but fails to provide much guidance as to what constitutes

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d faith. The act does state that ". . . any demand by the State for direct taxation of the Indian tribe or of any Indian lands [is] evidence that the State has not negotiated in good faith."[9] Nonetheless, IGRA places the burden of proof on the state to prove that it negotiated in good faith.

Under IGRA, tribes may file suit against a state in federal district court:

1) if a state does not respond to a request for negotiation, or

2) if a state does not negotiate in good faith, but only after 180 days have passed since the date the tribe first requested negotiations.

Upon finding that a state did not negotiate in good faith, the court may order the state and tribe to conclude a compact within 60 days. After the 60-day period, if the state and tribe still have not concluded a compact, each must submit their last, best offer to a federal mediator who will choose which of the compacts best complies with the terms of federal law and with the findings and order of the court.

Tribal Requirements Under the Act

IGRA requires tribes to adopt ordinances or resolutions regulating gaming before they may conduct Class II or Class III gaming activities. IGRA includes provisions regulating Class II gaming by tribes and any management contracts entered into by tribes. It also provides for civil penalties for violations and for judicial review. However, tribes need not adopt an ordinance or resolution *before* they request a state to negotiate for a class III compact, a U.S. District Court decided in *Mashantucket Pequot Tribe v. State of Connecticut, et al.*[10]

IGRA contains a provision that requires that at least 60 percent of the net proceeds from all non-tribally owned and operated Class III gaming on Indian lands be given to the tribe.

IGRA includes a grandfather provision for tribes already conducting card games that would otherwise be considered Class III gaming: Tribes in specified states operating banking card games before May 1, 1988, may continue operating the games without negotiating a tribal-state compact. In addition, IGRA permits tribes operating electronic video games of chance or slot machines before May 1, 1988, to continue operating for a one-year grace period while they seek to negotiate a Class III gaming compact.

The Indian Reorganization Act of 1934 authorizes ways for tribes to acquire lands and place them into trust with the federal government. Such land under tribal jurisdiction potentially can be the site of off-reservation gambling activities. However, IGRA provides that tribes may not conduct gaming on newly acquired tribal lands unless the secretary of interior, local officials and the governor of the state in which the gaming is to be conducted also concur that gaming is in the best interest of the Indian tribe and its members and not detrimental to the surrounding community. IGRA is not clear regarding the consequences should a governor and the secretary of interior disagree about the benefits of an off-reservation Indian gambling endeavor.

Judicial Interpretations of the Indian Gaming Regulatory Act

Case law interpreting IGRA has had a significant influence on the way gaming is conducted on Indian lands. Before IGRA was enacted, the 5th U.S. Circuit Court of Appeals in *Seminole Tribe of Indians v. Butterworth* upheld the tribe's rights to conduct high-stakes gambling on Indian lands, despite its prohibition elsewhere in the state.[11] In February 1987, the U.S. Supreme Court, in *California v. Cabazon Band of Mission Indians*, further strengthened tribal rights with regard to gambling.[12]

The "Civil Regulatory/Criminal Prohibitory" Rule

In *Cabazon*, the state of California attempted to require tribes to abide by state and local laws governing wagering on bingo and card games. The state argued that although its laws permitted low-stakes bingo and card games, violations of those limits and other regulations were "criminal and prohibitory" in nature, and thus, under federal law, applicable to tribes. However, the Court ruled that because California law generally permits and regulates gambling, the law must be classified as "civil and regulatory" and therefore not enforceable by the state on Indian lands.

Several court cases since *Cabazon* have applied the civil regulatory/criminal prohibitory rule to cases under IGRA. In *Mashantucket Pequot Tribe v. State of Connecticut* the U.S. Court of Appeals for the 2nd Circuit held that the state could not impose all the restrictions of the Connecticut statute regulating charitable gambling on the tribe's gambling enterprises.[13] Connecticut law permits nonprofit organizations to conduct "Las Vegas nights" and is therefore regulatory rather than prohibitory in nature.

In *United States v. Sisseton-Wahpeton Sioux Tribe*, the U.S. Court of Appeals for the 8th Circuit held that the tribe's operation of blackjack was Class II gaming under the grandfather provision of IGRA, even though the tribe had increased the number of tables, the number of days, and the hours of operation. In addition, the court noted, since "South Dakota regulates, rather than prohibiting, gambling in general and blackjack in particular," the tribe's blackjack operation "did not have to comply with South Dakota law on wager and pot limits."[14]

In *Lac du Flambeau Band of Lake Superior Chippewa Indians and the Sokaogon Chippewa Community v. State of Wisconsin*, decided July 18, 1990, the U.S. District Court extended the civil regulatory/criminal prohibitory rule to Class III gaming. The court found that,

> With the passage of an amendment to the Wisconsin Constitution permitting a state lottery and pari-mutuel betting, the state expressed its view that gambling in and of itself is not a threat to health and safety of its citizens, but is activity to be permitted subject to regulation; thus, enforcement of gambling laws on reservations of federally acknowledged Indian tribes now falls into civil-regulatory category over which state has no jurisdiction.[15]

The case also found that the state lacks the authority to prosecute violations of its gambling laws on Indian reservations,

~less it negotiates a compact in wh tribes consent to state sdiction. Until then, the federal government has exclusive .nority to enforce state gambling laws.

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, decided June 18, 1991, the court again applied the civil regulatory/criminal prohibitory rule.[16] Forms of Class III gaming other than the lottery and pari-mutuel betting are prohibited by statute in Wisconsin. However, the court again noted that since state law permits some Class III gaming, Wisconsin's policy toward Class III gaming is regulatory, rather than prohibitory. The court ordered the state to conclude a compact with the plaintiffs within 60 days. An appeal of the *Lac du Flambeau* case was dismissed on a technicality by the U.S. Court of Appeals for the 7th Circuit.[17]

The 11th Amendment of the U.S. Constitution

A recent Supreme Court decision changed the focus of cases involving IGRA, creating a new defense for states to use in response to lawsuits by tribes for "lack of good faith" in the gaming compact negotiation process. States have been able to use the 11th Amendment of the U.S. Constitution as part of their defense, contending basically that states are immune from suits by tribes. The 11th Amendment says:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Supreme Court has repeatedly held that Congress can override the 11th Amendment in certain circumstances, and only by making its intention unmistakably clear in the language of the statute.[18] The case law arising under IGRA had interpreted federal law as establishing federal court jurisdiction and overriding the states' 11th Amendment immunity. However, in June 1991, the U.S. Supreme Court held in *Blatchford, Commissioner, Department of Community and Regional Affairs of Alaska v. Native Village of Noatak* that the 11th Amendment bars suits by Indian tribes against states without state consent.[19] In *Blatchford*, Alaska native villages had brought suit seeking payment of state revenue-sharing funds. The Court noted that the statute in question, 28 U.S.C. 1362, "does not reflect an unmistakably clear intent to abrogate immunity" and that it "does not enable tribes to overcome . . . sovereign immunity."[20] Section 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Subsequently, three U.S. District Courts, in cases involving state-tribal gaming compacts, dismissed tribal suits against states based on the 11th Amendment.[21] At least one of the cases is being appealed. In addition, in two of the cases, the courts have allowed the suits to continue against governors or other state officials, to determine whether they had acted in good faith.

Questions su unding the 11th Amendment RA have not yet been fully answered, and future court sions are likely to clarify further how the challenges can be resolved. States that cannot reach agreement on a state-tribal gaming compact may find the 11th Amendment a powerful recourse, as the following opinion documented in testimony before the U.S. Senate Select Committee on Indian Affairs in March 1992 indicates:

> If the 11th Amendment proves to be a bar to tribal suits against states and state officials, then an important provision of the Indian Gaming Regulatory Act will have been undermined. The tribes will be left without a remedy when a state either refuses a tribe's legitimate request to negotiate a compact or fails to negotiate in good faith [testimony of Anthony J. Hope, Chairman, National Indian Gaming Commission].[22]

The Role of State Legislatures in Indian Gaming

State-Tribal Gaming Compact Negotiations

IGRA does not specify how states should go about negotiations for a state-tribal gaming compact. While requiring states to negotiate with tribes, IGRA does not specify whether "the state" refers to governors, executive department or agency officials, legislators or any combination of government officials. Therefore, states will differ in their approaches to the compact negotiation process, depending on provisions in state constitutions, statutes and case law.

In most states, governors have been the negotiating agent. However, state legislators should consider whether they need to grant specific statutory authority to a state entity to negotiate compacts. Doing so could expedite compact approval and preclude litigation. Many states find the 180-day timeline allowed for compact negotiations inadequate to complete negotiations, without having the added burden of determining questions of executive-legislative authority over the compacts.

For example, in Kansas the governor negotiated, signed and sent a compact to the National Indian Gaming Commission for federal approval without consulting the legislature. Legislators, feeling the governor had acted unlawfully, requested the Kansas attorney general's opinion on the issue. The opinion noted that "the governor may participate in negotiations and formulation of a tribal-state compact, but legislative action is necessary to make a compact binding and enforceable against the state."[23] The attorney general also noted, "If the legislature fails to take any action to further the progress of the compacts, the state may be subject to provisions of IGRA which authorize tribes to proceed to federal court. . ."[24]

At the request of the Kansas Legislature, the Department of Interior withheld its approval of the compact until the state had resolved the question of the governor's authority in state court. In July 1992, the Kansas Supreme Court, in a unanimous decision, held that the governor has authority to negotiate compacts, but not to bind the state to a compact with terms contrary to state law. Meanwhile, the governor has filed suit in federal court to force the secretary of interior's approval of the completed compact. In May 1992 the Kansas Legislature

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d to ban casino gambling in the state; the governor vetoed the legislation.

State Statutes Dealing with State-Tribal Negotiations

Several state legislatures have enacted statutes to clarify procedures and grant authority for negotiating state-tribal compacts. Ten states have enacted statutes addressing state-tribal gaming compacts under IGRA.

Four states specifically authorize governors to negotiate compacts:

Colorado *Colo. Rev. Stat. section 12-47.2-101 to -103 (West 1990 & Supp. 1991)*
Louisiana *1990 La. Acts, P.A. 888 (La. Rev. Stat. Ann. section 14:90 note (West 1986 & Supp. 1992))*
Minnesota *Minn. Stat. Ann. section 3.9221 (West 1977 & Supp. 1992)*
Wisconsin *Wis. Stat. Ann. section 14.035 (West 1986 & Supp. 1991)*

Six states grant a commission or agency the authority to negotiate state-tribal gaming compacts. Two of those states, Montana and Nebraska, have statutes addressing state-tribal agreements of all types.

California (racing board) *Cal. Business and Professions Code section 19445 (West 1987 & Supp. 1992)*
Iowa (Department of Inspections and Appeals) *Iowa Code Annotated section 10A.104(10) (West 1989)*
Montana (public agencies) *Mont. Code Ann. section 18-11-101 to 111 (1991)*
Nebraska (public agencies) *Neb. Rev. Stat. section 13-1501 to 1509 (Supp. 1990)*
South Dakota (Indian Affairs Commission) *S.D. Codified Laws section 42-7B-11(8) (Michie 1991) and 1-4-25 (Michie 1992)*
Washington (Gambling Commission) *1992 Wash. Laws, Chap. 172*

Other provisions of state laws include South Dakota's requirement that public hearings on gaming compacts be held and Minnesota's requirement that the governor report semiannually to the legislature on compact negotiations. Montana and Nebraska statutes delineate specific provisions that must be included in state-tribal agreements.

State Experiences in Negotiating State-Tribal Compacts

The concept of Indian tribal sovereignty has brought conflict between tribes and states from time to time, especially on such jurisdictional matters as law enforcement and taxation, both of which are closely intertwined with gambling. For tribes, acknowledgment of their sovereignty is a threshold that states need to cross before truly cooperative state-tribal relations can evolve. Over the years, states have done so, either explicitly or implicitly when they negotiate government-to-government agreements with tribes for environmental management, tax collection, law enforcement, and hunting and fishing regulation. Gaming compacts, a recent phenomenon, incorporate many of the same principles that states and tribes have used successfully in the past to reach agreement. (See Appendix B on page 13 for a summary of the Washington-Tulalip Tribes gaming compact.) However, the compact negotiation process is not a simple one. The following cases demonstrate various state responses to tribal Class III gaming proposals.

Colorado

In Colorado, the governor appointed the following members of the state negotiating team: the director of the Department of Revenue, the director of the Division of Gaming and two representatives of the attorney general's office. Negotiations for compacts are in process with the Southern Ute tribe. The Ute Mountain Ute tribe and the state reached agreement on terms of a gaming compact in May 1992. Casino gambling is authorized by law only in three Colorado towns: Central City, Black Hawk and Cripple Creek. For the present, the state and both tribes have agreed to abide by the same games and bet limits authorized by state law for casino gambling in the three localities.

Connecticut

In March 1989, the Mashantucket Pequot Tribe requested Connecticut's governor to enter into negotiations for a tribal-state gaming compact that would allow high-stakes casino gambling. The governor responded that he had asked the state's acting attorney general to review IGRA and the state's obligations. In July, the attorney general sent a letter to the tribe stating that the state would not negotiate with the tribe if the tribe intended to conduct high-stakes gambling. The attorney general noted, however, that the state would negotiate if the tribe intended to conduct casino gambling that would abide by the state's law that set up wager and prize limits for Las Vegas nights. The attorney general also wrote that the governor would appoint a negotiating team. The tribe responded in writing on August 1, expressing its hope to meet with the negotiation team. The attorney general responded by letter on August 23, reiterating its arguments and asking whether the tribe had adopted a gaming ordinance. The tribe was never advised of the appointment of a negotiation team.

After more than six months had passed without a compact being completed, the tribe filed suit, claiming the state had failed to negotiate in good faith. The tribe requested the court to order the state to conclude a compact within 60 days. The state responded by claiming that it was under no obligation to negotiate because the tribe had not yet adopted an ordinance governing its proposed casino. The state also claimed that it was not required to negotiate for forms of gambling that state law does not generally permit.

The court held that the tribe was not required to adopt an ordinance before seeking compact negotiations, and further, that the state could not impose all the restrictions of state law upon the tribe, without undergoing negotiations. The state was ordered to conclude a compact with the tribe within 60 days of the ruling (May 15, 1990).

The state appealed the ruling and lost, in a decision rendered in September 1990. Despite negotiations during the appeal, the state and the tribe failed to reach agreement on a compact within 60 days. Thus, each submitted its last, best offer, to a court-appointed mediator. The tribe subsequently withdrew its proposal, and the mediator selected the state

compact. Meanwhile, the state refus[illegible] to consent to its own compact proposal, preferring to wait [illegible] the result of appeals pending in the U.S. Court of Appeals, and subsequently, in the U.S. Supreme Court. As authorized by IGRA, the secretary of the interior then prescribed procedures for Class III gaming conducted by the tribe, based largely on the state's compact. The procedures were finalized and became effective on May 31, 1991.

Governor Lowell Weicker Jr., still attempting to block the casino, hoped to secure passage of legislation that would repeal the state's charitable gambling laws entirely. However, the bill failed in the state House of Representatives in May 1991. The Pequot's Foxwoods casino opened its doors on February 15, 1992, and on April 20, 1992, the Supreme Court denied the state's request to hear the case.

Florida

The governor appointed his general counsel to negotiate with the Seminole Tribe's request to conduct casino gambling. Florida's assistant attorney general was assigned to assist the governor's counsel. Several compact meetings have thus far failed to result in an agreement. The tribe hopes to operate electronic games of chance, but the state interprets those games as illegal under Florida law. The tribe has filed suit against the state in federal court.

Minnesota

Minnesota's negotiation team is appointed by the governor. The team includes two state senators, one state representative, the director of the state lottery and the governor's counsel. Eleven compacts were approved in Minnesota as of February 1992; six tribes have each negotiated one compact for video gambling and one compact for blackjack. The compacts all apply to on-reservation gambling. The current blackjack compacts were approved as a settlement of a lawsuit brought by the tribes. Currently, the tribes have requested negotiations regarding lottery games, paddlewheels, and off-track betting. For further information, readers may consult a March 1992 report by the Minnesota Planning Agency entitled "High-stakes: Gambling in Minnesota" that documents gambling trends, impacts and issues in the state, including fiscal, social and economic data on Indian gaming.

Montana

The governor designates members of the state negotiating team. Members include the administrator of the Gambling Control Division of the Department of Justice (the lead negotiator), the administrative officer of the Gambling Control Division of the Department of Justice, the deputy director of the Department of Commerce, the governor's chief legal counsel and the assistant attorney general. The coordinator of Indian affairs is an observer. Negotiating sessions are open to the public. Meeting sites alternate between tribal locations and the state capitol.

There is no statute granting the governor authority to negotiate, but a tribal-state cooperative agreements act requires review of those agreements by the attorney general for form and legal substance prior to signing by the governor. Class III gambling activities fall under regulation by the Gambling Control Division of the Department of Justice.

Three compac[illegible]ere being negotiated with the [illegible]m Cheyenne Tribe, the Crow Tribe and Chippewa-Cr[illegible]e, but negotiations were halted in June 1992. The main areas of difficulty in the negotiations had to do with civil regulatory jurisdictional questions, e.g. hours of operation, payouts, types of machines and taxes. The state wants control over non-Indians doing business on Indian lands while leaving control over tribally operated enterprises in the hands of the tribes. Tribes are seriously considering full casino-type gaming, but the state wants them to allow only the same type of gambling activities that are permitted by the state in non-Indian establishments.

North Dakota

No compacts had been completed in North Dakota as of May 1992, but three tribes had requested negotiations. Only one is now actively negotiating; the other two tribes have suspended negotiations. The governor appointed the attorney general to negotiate.

The tribe's proposed compact would allow them to conduct all forms of casino gambling without betting limits. The state's counterproposal offers $100 limits on blackjack and $25 limits on poker (these limits compare to the state's $5 blackjack limit and $1 poker limit). The state and tribes also disagree on video gambling. To date, no lawsuits have been filed.

The director of the gaming commission notes that the state met several times with the chairman of the National Indian Gaming Commission and provided testimony regarding the federal commission's proposed rules. The state's testimony urged a better definition of Class III gaming. In addition, the state expressed concern about how tribes are currently operating games illegally. The federal government will not assume an enforcement role until a compact is in place, and because of this, the state gaming commission director argues, the tribes have no incentive to agree on a compact.

South Dakota

The governor is authorized by statute to negotiate with tribes for various kinds of compacts, although gaming compacts are not specifically mentioned. A requirement for a public hearing prior to final adoption of any compact or agreement was added to the statute in recent years. Legislative approval of completed compacts is not required. The state negotiating team chosen by the governor consists of the governor's legal counsel and the deputy attorney general. The question of how many machines a tribe may operate has been a main sticking point during compact negotiations. A bill was introduced in the 1992 legislative session that would have allowed tribes to have as many gaming machines as the market could sustain, rather than limiting them to a compact-specified number; it died quickly.

As of March 1, 1992, six compacts with four South Dakota tribes had been approved by the Interior Department. Four compacts with four tribes (Sisseton-Wahpeton, Flandreau Santee, Yankton and Lower Brule Sioux) cover Deadwood-style gaming (slots, blackjack and poker). Additional compacts with two of those tribes deal with video lottery games. Two

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pacts with the Crow Creek Sioux—one a Deadwood-style, the other a video lottery—have been signed but have not approved by Interior.

No lawsuits have been filed, although some tribes have indicated intentions to do so.

Washington

The governor has designated the Gambling Commission to take the lead in state negotiations. Members of the state negotiating team may include the lead negotiator from the Gambling Commission and representatives from the office of the attorney general, the State Patrol, the Department of Revenue, the Horseracing Commission, the Department of Community Development, the Liquor Control Board, the League of Cities, the Association of Counties and other concerned entities. The tribes send teams, usually made up of tribal council members, varying in size from four to 10 members. To date there is no legislative involvement in the compact process.

Gaming compact negotiations with eight tribes are in varying stages of completion. As of March 1, 1992, two compacts had been completed, one with the Tulalip Tribe and one with the Nooksack. One lawsuit has been filed (by the Spokane Tribe) challenging the state's good-faith negotiation efforts. The case against the state was dismissed on the basis of the 11th Amendment, but the governor remains a party to the suit.

State law allows charitable organizations to hold annual casino nights limited to $10,000 gross intake and lasting no longer than 72 hours. Pulltabs are also permitted. These legal activities made it possible for tribes to propose to undertake similar ventures. Operators of the Mirage, a large Nevada gambling concern, have approached the Puyallup Tribe about opening a casino, prompting concerns about the infiltration of organized crime.

Wisconsin

Seven compacts have been approved by the Interior Department. The governor, by statute, may enter into any compact that has been negotiated under IGRA on behalf of the state. The legislature, in special session in June 1992, passed legislation that creates a specific statutory definition of what does and does not constitute a "lottery" that is more specific than that contained in the state constitution. The legislation specifies that this statutory definition will have no effect on state-tribal gaming compacts negotiated before January 1, 1993 (all tribes in the state have either completed or are currently negotiating compacts). The existing state-tribal compacts expire after seven years, but can be extended for an additional five years upon agreement of both parties. It is unclear whether the new statutory language would allow the state to prohibit tribes from offering certain games after the compacts expire.

Conclusion

The state-tribal gaming compact negotiation process described under IGRA has failed to provide the answer to an important question: Which gambling policy will prevail within a state's boundaries—the one authorized for state citizens by the state legislature (or the state constitution), or the one(s) on Indian lands that tribes pursue under the federal policy of tribal self-government and self-determination?

Limiting tribal gaming to the same gaming allowed under state law could be accomplished in at least two ways: (1) by amending IGRA to require that tribal gaming conform to the same restrictions that apply elsewhere within a state's boundaries, or (2) by gaining tribal agreement during the compact negotiation process to accept state limitations. Prohibiting certain forms of gaming by enacting state legislation or amending state constitutions may offer a third alternative, although courts will have to decide whether changing state laws to prohibit, define or other modify current gaming laws can affect existing state-tribal compacts or negotiations.

The Western Governors' Association and the National Association of Attorneys General have recommended amendments to IGRA. (See Appendix C on page 15.) Realistically, however, Congress is unlikely to amend IGRA in the near future, choosing instead to rely on the National Indian Gaming Commission to devise regulations that may incorporate some of the states' concerns and on the courts to clarify answers to the legal questions.

States can postpone compact negotiations while waiting to see what federal courts ultimately decide about tribes' right to sue states under IGRA. Or states can use the current uncertain legal situation to continue negotiations with willing tribes for the regulation of their gaming activities. Whatever course is chosen, state legislatures that are knowledgeable about IGRA, the negotiation process and judicial interpretations of IGRA will be prepared to take appropriate action when the need arises to clarify their policies. Additional activities may include: (1) gathering accurate information on the costs and benefits of tribal gaming; (2) sharing information among governors' offices, state attorneys general and concerned state legislators, as well as with other states; (3) maintaining open communication with tribal members and tribal leadership on a variety of issues; (4) passing state enabling legislation for the conduct of gaming negotiations and the approval of compacts; and (5) providing testimony to Congress and comments to the National Indian Gaming Commission regarding IGRA.

There is little doubt that the conduct of gaming activities will continue to have a significant impact on the evolving nature of state-tribal legal relationships. Gambling is an emotional issue. Tribally-controlled gambling can mean economic survival to tribes that have not found any successful approach until now. But tribal gambling that conflicts significantly with state law and state policy is not acceptable to most states. States and tribes that can maneuver successfully through the ambiguities of IGRA by acknowledging one another's legitimate concerns and forging gambling regulatory arrangements that benefit all the people of a state will be ahead of the game in the long run.

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1. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981).

2. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 94 L.Ed.2d 244, 107 S. Ct. 1083 (1987).

3. 25 U.S.C. section 2703(6) (1988)

4. U.S. Congress. Senate. Indian Affairs Committee. *Indian Gaming Regulatory Act.* 100th Cong., August 3, 1988. S. Rept. 446.

5. 25 U.S.C. section 2703(7)(A) (1988)

6. 25 U.S.C. section 2703(7)(B) (1988)

7. U.S. Congress. Senate. Indian Affairs Committee. *Indian Gaming Regulatory Act.* 100th Cong., August 3, 1988. S. Rept. 446.

8. Oneida Tribe of Indians v. State of Wisconsin, 951 F.2d 757 (7th Cir. 1991).

9. 25 U.S.C. section 2710(d)(7)(B)(iii)(II) (1988)

10. Mashantucket Pequot Tribe v. State of Connecticut, 737 F.Supp. 169 (D.Conn. 1990).

11. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981).

12. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 94 L.Ed.2d 244, 107 S. Ct. 1083 (1987).

13. Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024 (2nd Cir. 1990).

14. U.S. v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir. 1990).

15. Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 743 F.Supp. 645 (W.D. Wis. 1990).

16. Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F.Supp. 480 (W.D. Wis. 1991).

17. Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, No. 91-2698 (7th Cir. March 23, 1992) (LEXIS, Genfed library, Mega file).

18. Erwin Chemerinsky, "Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term," *DePaul Law Review* 39 (1989):332.

19. Blatchford v. Native Village of Noatak, ___ U.S. ___, 111 S.Ct. 2578, 115 L.Ed. (1991).

20. Blatchford v. Native Village of Noatak, ___ U.S. ___, 111 S.Ct. 2578, 115 L.Ed. (1991).

21. Poarch Band of Indians v. State of Alabama, 776 F.Supp. 550; Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan, No. CS-91-212-FVS (W.D. Wash. December 31, 1991) (LEXIS, Genfed library, Mega file); Spokane Tribe of Indians v. State of Washington, No. 1:90-CV-611 (W.D. Mich. March 26, 1992) (WESTLAW, Allfeds database).

22. U.S. Congress. Senate. *Oversight Hearing Before the Select Committee on Indian Affairs on the Implementation of the Indian Gaming Regulatory Act.* 102nd Cong., March 18, 1992.

23. 91 Op. Att'y. Gen. Conn. 119 (1991).

24. U.S. Congress. Senate. Judiciary Committee. *Indian Gaming Regulatory Act.* 102nd Cong., January 15, 1992.

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APPENDIX A

State-Tribal Compacts for Class III (Casino) Gambling
Approved by Department of Interior, Bureau of Indian Affairs, National Indian Gaming Commission
January 1990 through June 1992

California
Barona Group of the Capitan Grande Band of Mission Indians, compact effective 6/30/92
Cabazon Band of Mission Indians, compact effective 3/27/90
San Manuel Band of Mission Indians, compact effective 4/2/91
Sycuan Band of Mission Indians, compact effective 10/18/90
Viejas Band of Mission Indians, compact effective 6/25/90

Connecticut
Mashantucket Pequot Tribe, compact effective 5/31/91

Iowa
Omaha Tribe of Nebraska, compact effective 2/28/92
Sovereign Indian Nation of the Sac and Fox Tribe of the Mississippi in Iowa, compact and compact amendment effective 4/30/92
Winnebago Tribe of Nebraska, compact and compact amendment effective 4/30/92

Minnesota
Bois Fort Band of Lake Superior Chippewa Reservation, compact effective 3/27/90
Bois Forte Band of Chippewa, compact effective 10/3/91
Fond Du Lac Band of Lake Superior Chippewa Reservation, compact effective 3/27/90
Fond Du Lac Band of Lake Superior Chippewa Reservation, compact effective 10/3/91
Grand Portage Band of Lake Superior Chippewa Reservation, compact effective 3/27/90
Grand Portage Band of Chippewa, compact effective 10/3/91
Leech Lake Band of Chippewa Indians, compact effective 8/20/90
Leech Lake Band of Chippewa, compact effective 10/3/91
Lower Sioux Indian Community, compact effective 10/3/91
Lower Sioux Community Reservation, compact effective 3/27/90
Mille Lacs Band of Chippewa Indians, compact effective 6/25/90
Mille Lac Band of Chippewa Indians, compact effective 10/3/91
Prairie Island Sioux Community Reservation, compact effective 3/27/90, amendment I effective 4/17/91
Prairie Island Indian Community, compact effective 10/3/91
Red Lake Band of Chippewa, compact effective 8/9/91
Red Lake Band of Chippewa, compact effective 10/3/91
Shakopee Mdewakanton Sioux Community Reservation, compact effective 3/27/90
Shakopee Mdewakanton Sioux Community Reservation, compact effective 10/3/91
Upper Sioux Indian Community, compact effective 11/26/90; amendment I effective 4/12/91
Upper Sioux Indian Community, compact effective 10/3/91
White Earth Band of Chippewa, compact effective 10/3/91
White Earth Band of Chippewa, compact effective 11/13/91

Nebraska
Omaha Tribe of Nebraska, compact effective 1/8/91
Omaha Tribe of Nebraska, compact effective 2/28/92

Nevada
Ft. Mojave Tribe, compact effective 3/27/90

South Dakota
Crow Creek Sioux Tribe, compact effective 4/15/92
Flandreau Santee Sioux Tribe, compact effective 8/2/90
Lower Brule Sioux Tribe, compact effective 9/17/91
Lower Brule Sioux Tribe, compact and amendment I effective 4/14/92
Sisseton-Wahpeton Sioux Tribe, compact effective 4/1/91
Sisseton-Wahpeton Sioux Tribe, compact effective 12/4//91
Yankton Sioux Tribe, compact effective 6/19/91

Washington
oksack Indian Tribe of Washington, compact effective 6/23/92
Klalip Tribes of Washington, compact effective 10/3/91

Wisconsin
Bad River Band of Lake Superior Chippewa, compact effective 4/3/92
Lac Courte Orielles Band of Lake Superior Chippewa Indians, compact effective 4/20/92
Oneida Tribe of Indians of Wisconsin, compact effective 1/30/92
Red Cliff Band of Lake Superior Chippewa, compact effective 3/10/92
Sokaogon Chippewa Community, compact effective 2/13/92
St. Croix Chippewa Indians of Wisconsin, compact effective 3/10/92
Stockbridge-Munsee Community, compact effective 4/23/92

Total: 50 compacts in nine states

Source: *Federal Register Index*, January - December 1990 and January - December 1991, January - May 1992, and *Federal Register*, June 23 and 30, 1992.

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APPENDIX B

Summary of Tribal-State Compact for Class III Gaming between the Tulalip Tribes of Washington and the State of Washington

The compact provides for a single gaming facility, owned, operated and managed by the tribes. The gaming floor space is not to exceed 12,000 square feet. A number of table games are authorized in the compact identical to those allowed under state law in licensed fund-raising events. The games include blackjack, craps and roulette.

A total of 23 gaming stations are allowed, a maximum of 19 to be blackjack. After 18 months of continual operation during which no serious problems of a criminal nature have resulted, the number of stations may be increased to 31.

Initial wagering limits are $10 per wager for 13 stations and $25 for 10 stations. After 18 months, this may be increased to $25 for 13 stations and one station at $100 with all remaining stations at a maximum of $10 per wager.

The facility will be open to the public for a total of 80 hours per week at the discretion of the tribes, with closure daily from 2:00 am until 6:00 am.

A dual system of licensing has been established. All employees of the gaming operation, suppliers and manufacturers of gambling devices will be licensed by the tribes and certified by the state. All background and financial investigations pursuant to state certification will be conducted by the state. Applications, violations and sanctions will be consistent with current procedures.

The tribes and the state recognize concurrent civil and criminal jurisdiction with the authority to investigate gambling-related crimes that occur on Tulalip tribal lands. All civil fines collected by the state or the tribes will be distributed to the Washington State Council on Problem Gaming, a non-profit organization dedicated to addressing the ills of problem gambling.

The tribes will have the primary responsibility for on-site regulation, control and security of the gaming operation. The tribes, with the concurrence of the state, will adopt regulations for the conduct of the gaming operation.

Nonjudicial dispute resolution options have been developed as an alternative to seeking the ultimate remedy of a federal court injunction by either party.

The tribes will reimburse the state for all costs and expenses actually incurred by the state in carrying out its responsibilities as authorized by the compact.

The tribes agree to comply with applicable environmental, health, building and zoning standards with respect to the public health and safety.

A contribution of 2.5 percent of the operation's net win will be disbursed annually to Snohomish County and the City of Marysville for law enforcement purposes to defray potential community impacts that may result from the operation of the Class III gaming facility. In addition, the tribes agree to meet with community leadership to discuss any concerns recognized as a result of the operation.

No persons under the age of 18 shall participate in the activities. If alcoholic beverages are offered on the gaming floor, the service shall be in compliance with applicable law, and no person under the age of 21 shall be permitted on the gaming floor during the actual hours of operation.

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APPENDIX C (1)

Western Governors Association
Resolution 92-012
June 23, 1992
Jackson, Wyoming

SPONSOR: Governors Sullivan, King and Mickelson
SUBJECT: Call for Amendments to Indian Gaming Regulatory Act

A. BACKGROUND

1. In 1988, Congress approved and President Reagan signed into law the Indian Gaming Regulatory Act (IGRA) of 1988. The IGRA was designed both to ensure that states have some say in the gaming activities allowed within their borders, and to protect Native American tribes who lack experience in the regulation of gaming from unscrupulous promoters.

2. IGRA set up three classifications of gaming activities for Native American tribes. Class I involves traditional Indian gaming and is operated solely at the discretion of the tribes. Class II games include bingo, certain card games and video displays of those games and are regulated by the Indian Gaming Commission. Class III games are essentially every other gaming activity, including casino-type gaming. Tribes are not allowed to engage in Class III gaming without an agreement with the state.

3. Under IGRA, a tribe seeking to operate a Class III gaming activity must ask a state to negotiate a compact which allows such activity. The state and the tribe then have 180 days to negotiate a compact. If no compact is agreed upon within that period, the tribe has cause for legal action if it can show the state did not negotiate in "good faith."

4. This good faith requirement does not apply to the tribe seeking the compact, nor is "good faith" defined either by IGRA or the Indian Gaming Commission. The Commission has said to define "good faith" would be "beyond the scope" for their authority.

5. Some interpretations of IGRA, including the Wisconsin federal court decision *Lac du Flambeau Band of Lake Superior Indians v. Wisconsin*, have suggested that if a state allows any type of Class III gaming, then the state is obligated to allow the tribe, through its compact, to operate all forms of Class III gaming.

6. As of earlier this year, the process created by IGRA has allowed 28 tribes and nine states to successfully negotiate a compact. However, at the same time, tribes in 13 different states have initiated action in federal courts against state governments or U.S. attorneys alleging "bad faith."

B. GOVERNORS' POLICY STATEMENT

1. The western governors support the efforts of Native Americans to create better and more prosperous lives, and every governor desires good relations with the tribes located within his or her state. In 1989, the western governors passed a resolution affirming the governors' commitment to working with the tribes on a government-to-government basis and promoted state-tribal cooperation to resolve difficult and contentious issues.

2. The western governors do not seek to prevent Native Americans from pursuing any opportunity available to a state's non-Indian citizens, but also do not believe Native Americans should be allowed to engage in gaming activities illegal for other citizens.

3. While the compact process has clearly yielded some successes, it has also led to litigation that is not productive for either the states or the tribes, and is not conducive to good state-tribal relations.

4. Clarifying amendments to IGRA should substantially reduce areas of conflict between states and tribes on gaming issues. These amendments should:

   a. Make clear that tribes can operate gaming subject to the same restrictions other state citizens operate under. This recognizes the significant range of gaming activities included within Class III, and should ensure that simply because a state allows one form of Class III gaming (for example, specific

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wagering li s), it is not obligated to enter into a compa which would allow a tribe to op ny and all forms of Class III gaming.

b. Define what the Act means by "good faith," and apply that standard to all parties in the negotiation, not just state governments. It should also be clarified that failure to complete a compact is not an assumption of bad faith by either side. A clear definition can both prevent stonewalling and put neither side at a disadvantage during the negotiations.

c. Clarify whether lands controlled by tribes but not within the confines of their reservations fall within the provisions of IGRA.

5. The western governors also believe the Department of Interior should clarify its position regarding IGRA. The western governors believe IGRA clearly states that, with limited exceptions, gaming operated by tribes off-reservation requires the approval of the governor of that state and such activities cannot be condoned solely at the discretion of the Secretary of Interior.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. Copies of this resolution should be transmitted to the President, the Departments of Interior and Justice, the chairman of the Indian Gaming Commission, the chairmen and ranking minority members of the House Committee on Interior and Insular Affairs and Senate Select Committee on Indian Affairs and all western congressional members.

2. The staff of the Western Governors' Association is also directed to work with appropriate entities to develop specific language for amendments to IGRA that address the concerns of the western governors listed in this resolution.

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APPENDIX C (2)

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting
July 8-11, 1992
Pittsburgh, Pennsylvania

RESOLUTION

AMENDMENT OF THE INDIAN GAMING REGULATORY ACT

WHEREAS, the Indian Gaming Regulatory Act of 1988, Pub.L.No. 100-497, 102 Stat. 2467 (codified at 18 U.S.C. Sec. 1166-1168 & 25 U.S.C. Sec. 2701-2721), was enacted by the Congress and approved by the President for the express purpose of providing clear standards and regulations for the conduct of gaming on Indian lands where the gaming activity is not specifically prohibited by federal law and which is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity, see id. Sec. 25 U.S.C. Sec. 2701(3), (5); and

WHEREAS, the Congress adopted the Indian Gaming Regulatory Act of 1988 in an effort to achieve a delicate compromise between the sovereignty of the several States and the special sovereign status of Indian Tribes, acknowledging the need for strict regulation and control of gaming to prevent the influence of criminal elements and to protect gaming patrons, and in order to promote a fair balancing of competitive economic interests; and

WHEREAS, the Indian Gaming Regulatory Act of 1988 is the product of protracted negotiations between gaming Indian tribes, the several States, the gaming industry, the Administration, and the Congress, that was intended to resolve a decade of political and judicial controversy surrounding the legality, regulation and control of gaming on Indian lands; and

WHEREAS, since enactment of the Indian Gaming Regulatory Act of 1988, the number and frequency of political and judicial conflicts relative to the legality, regulation and control of gaming on Indian lands, have increased dramatically, particularly on the question of the scope of legal gaming on Indian lands, the effect on state law upon the legality of such gaming, the authority of the Governors of the several States regarding such gaming and the effect of the 11th Amendment; and

WHEREAS, courts have interpreted the language of the Act to suggest that whenever a State permits some Class III gaming activities, the tribes are entitled to *all* Class III gaming activities, despite the absolute criminal prohibition on various of these gaming activities in certain States, and

WHEREAS, the language of the Act permits tribal-state compacts to include only the Class III gaming activities permitted by the States, and such language accurately reflects the intent of Congress; and

WHEREAS, the National Association of Attorney General is an organization comprised of the Attorneys General of the States and Territories of the United States, most of which have a demographic and historical relationship with a large number of Native Americans and their tribal governments; and

WHEREAS, the National Association of Attorneys General and the Association's member Attorneys General are gravely concerned that absent prompt action by the Congress to address certain questions that have arisen under the Indian Gaming Regulatory Act of 1988, the objectives of strict control of gaming to protect against criminal influence and the preservation of the criminal laws and public policy of the several States relative to gaming will be irreparably frustrated;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Calls upon the Congress to clarify those issues and sections of the Indian Gaming Regulatory Act which have been subject to litigation in order to avoid the costs associated with repetitious litigation and the years of uncertainty and turmoil that such a process produces; and

2. Encourages Congress to hold hearings as a prelude to any action that includes participation from Governors, State Attorneys General, Tribes, Law Enforcement Officials and other interested parties; and

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3. Urges the Congress to specifically include in its review of IGRA critical issues such as the scope of gaming on Indian lands, the effect of state law upon the legality of such gaming, and the authority of the Governors of the several States regarding such gaming and the effect of the 11th Amendment; and

4. Directs the Executive Director of the National Association of Attorneys General to transmit a true and correct copy of this Resolution to the leadership of the Congress of the United States and other interested persons.

Abstains: Attorney General Mary Sue Terry

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National Conference of State Legislatures
1560 Broadway, Suite 700
Denver, Colorado 80202

STATE LEGISLATIVE REPORT

NATIONAL CONFERENCE OF STATE LEGISLATURES

HOUSE BILL NO. ____

By Legislative Coordinating Council

AN ACT concerning gambling; providing procedures for negotiating and entering tribal-state gaming compacts; relating to implementation of such compacts; amending K.S.A. 21-4302 and K.S.A. 1992 Supp. 21-4306 and 21-4307 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. As used in sections 1 through 6:

(a) "Class III gaming" has the meaning provided by the Indian gaming regulatory act (25 U.S.C. 2701 et seq.).

(b) "Gaming compact" means a tribal-state compact regarding class III gaming as provided by section 11 of the Indian gaming regulatory act (25 U.S.C. 2710).

(c) "Gaming operation" means an enterprise operated for the conduct of class III gaming.

(d) "Manager of a gaming operation" means any individual or entity managing a gaming operation under a management contract approved pursuant to the Indian gaming regulatory act (25 U.S.C. 2701 et seq.).

New Sec. 2. (a) The governor or the governor's designated representatives are authorized to negotiate gaming compacts. Upon completion of negotiation of any gaming compact, the governor shall submit the proposed compact to the joint committee on gaming compacts for the committee's approval, recommendations for modification or rejection. If the committee approves the proposed compact, the governor is authorized to enter into the compact on behalf of the state. If the committee recommends modification of the proposed compact, the governor or the governor's representatives shall resume negotiations in accordance with the committee's recommendations and the modified proposed compact

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shall be submitted to the committee in the same manner as the original proposed compact. If the committee rejects the proposed compact, the governor or the governor's representatives shall renegotiate a compact.

(b) If the governor fails or refuses to resume negotiations or renegotiate a compact when required by subsection (a), the joint committee on gaming compacts shall perform the duties of the governor under subsection (a) and the president of the senate and the speaker of the house of representatives jointly are authorized to enter into the compact on behalf of the state.

(c) The attorney general shall be the legal counsel for the governor or the governor's representatives in negotiating a gaming compact under this section.

(d) A gaming compact negotiated on behalf of the state under this section shall contain:

(1) A provision recognizing the right of each party to the compact, including the legislature by concurrent resolution, to request that the compact be renegotiated or replaced by a new compact and providing the terms under which either party, including the legislature, may request a renegotiation or the negotiation of a new compact; and

(2) a provision that, in the event of a request for a renegotiation or a new compact, the existing compact will remain in effect until renegotiated or replaced.

(e) The governor, or the governor's designated representatives, and the attorney general shall report to the joint committee on gaming compacts, at such times as requested by the committee, regarding gaming compacts negotiated and prospective negotiations.

New Sec. 3. (a) There is hereby established the joint committee on gaming compacts, which shall consist of five senators and five members of the house of representatives. Of the senate members, three shall be appointed by the president of the senate and two by the minority leader of the senate. Of the

house of representative members, three shall be appointed by the speaker of the house of representatives and two by the minority leader of the house of representatives.

(b) The joint committee on gaming compacts shall:

(1) Establish and transmit to the governor guidelines reflecting the public policies and state interests that gaming compacts must address;

(2) review and hold public hearings on proposed gaming compacts submitted to the committee by the governor; and

(3) approve, recommend modification of or reject any proposed gaming compact submitted to the committee by the governor. The committee shall notify the governor, in writing, of the committee's action on the proposed compact. If the committee rejects the proposed compact, the notice to the governor shall include the reasons for rejection of the compact.

(c) The president of the senate shall designate a senator member to be chairperson of the committee on gaming compacts in even-numbered years and the vice-chairperson in odd-numbered years. The speaker of the house of representatives shall designate a representative member to be chairperson of the committee in odd-numbered years and the vice-chairperson in even-numbered years. The vice-chairperson shall exercise all of the powers of the chairperson in the absence of the chairperson.

(d) A quorum of the joint committee on gaming compacts shall be six. All actions of the committee may be taken by a majority of those present when there is a quorum.

(e) The joint committee on gaming compacts may meet at any time and at any place within the state on the call of the chairperson.

(f) The provisions of the acts contained in article 12 of chapter 46 of the Kansas Statutes Annotated, and amendments thereto, applicable to special committees shall apply to the joint committee on gaming compacts to the extent that the same do not conflict with the specific provisions of this act applicable

to the joint committee.

(g) In accordance with K.S.A. 46-1204 and amendments thereto, the legislative coordinating council may provide for such professional services as may be requested by the joint committee on gaming compacts.

(h) The joint committee on gaming compacts may introduce such legislation as it considers necessary in performing its functions.

New Sec. 4. (a) There is established, within and as a part of the department of revenue, a division of Indian gaming, the head of which shall be the director of Indian gaming. The secretary of revenue shall appoint the director of Indian gaming, subject to confirmation by the senate as provided in K.S.A. 75-4315b and amendments thereto, and the director shall serve at the pleasure of the secretary of revenue. The director of Indian gaming shall be in the unclassified service under the Kansas civil service act and shall receive an annual salary fixed by the secretary of revenue and approved by the governor.

(b) The director of Indian gaming shall:

(1) Carry out all duties imposed upon the state by any gaming compact;

(2) conduct or cause to be conducted an annual financial audit of each gaming operation and provide a copy of such audit to the Kansas bureau of investigation; and

(3) perform such other duties as provided by law.

(c) The director of Indian gaming shall require fingerprinting of: (1) Any officer or director of any gaming operation or of any manager of a gaming operation; (2) any individual having an ownership interest of 3% or more in any gaming operation or in any manager of a gaming operation; (3) each management or supervisory employee of any gaming operation or of any manager of a gaming operation; and (4) any other individuals as provided by any gaming compact. The director shall submit such fingerprints to the Kansas bureau of investigation

and to the federal bureau of investigation for the purposes of verifying the identity of such individuals and obtaining records of criminal arrests and convictions.

(d) The director of Indian gaming may receive from the Kansas bureau of investigation or other criminal justice agencies such criminal history record information (including arrest and nonconviction data), criminal intelligence information and information relating to criminal and background investigations as provided by any gaming compact. Upon the written request of the director, the director may receive from the district courts such information relating to juvenile proceedings as provided by any gaming compact. Disclosure or use of any information received by the director pursuant to this subsection, or of any record containing such information, for any purpose other than that provided by this subsection is a class A misdemeanor and shall constitute grounds for removal from office, termination of employment or denial, revocation or suspension of any license issued under this act. Nothing in this subsection shall be construed to make unlawful: (1) The disclosure of any such information by the director in a hearing held pursuant to a gaming compact; or (2) negotiation by the director with the subject of such information regarding such information.

(e) The secretary of revenue shall adopt such rules and regulations as necessary to implement the provisions of this section.

New Sec. 5. (a) The Kansas bureau of investigation shall monitor class III gaming conducted pursuant to any gaming compact to ensure compliance with the provisions of the compact. The bureau of investigation shall provide to the director of Indian gaming periodic reports of the bureau's monitoring activities pursuant to this section and the results of such monitoring activities.

(b) Agents of the Kansas bureau of investigation shall have reasonable access to all areas of any place where class III

gaming is conducted pursuant to a gaming compact. Such access shall be in a manner that does not interfere with the normal operation of such gaming.

(c) Agents of the Kansas bureau of investigation shall have access, during normal business hours, to all records of class III gaming conducted pursuant to a gaming compact.

New Sec. 6. (a) There is hereby created in the state treasury the Indian gaming fund.

(b) All moneys payable to the state or to any subdivision of the state pursuant to any gaming compact shall be paid to the director of Indian gaming. The director shall remit all such moneys to the state treasurer, who shall deposit the entire amount in the state treasury and credit it to the Indian gaming fund. All moneys credited to the fund shall be expended or transferred only for the purposes and in the manner provided by this act and by gaming compacts entered pursuant to this act. Expenditures from the fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary of revenue or a person designated by the secretary.

(c) Except as otherwise provided by this act, all operating expenses of the division of Indian gaming, all expenses incurred by the state in carrying out duties imposed by a gaming compact or in monitoring class III gaming activities pursuant to a gaming compact and all moneys payable to subdivisions of the state under a gaming compact shall be paid from the Indian gaming fund. Whenever another state agency assists the division of Indian gaming in carrying out such duties or monitoring such activities and incurs costs in addition to those attributable to the operations of such agency, such additional costs shall be paid from the Indian gaming fund. The furnishing of assistance shall be a transaction between the division and the respective agency and shall be settled in accordance with K.S.A. 75-5516 and amendments thereto.

(d) On the 10th of each month, the director of accounts and reports shall transfer from the state general fund to the Indian gaming fund, the amount of money certified by the pooled money investment board in accordance with this subsection. Prior to the 10th of each month, the pooled money investment board shall certify to the director of accounts and reports the amount of money equal to the proportionate amount of all the interest credited to the state general fund for the preceding period of time specified under this subsection, pursuant to K.S.A. 75-4210a and amendments thereto, that is attributable to money in the Indian gaming fund. Such amount of money shall be determined by the pooled money investment board based on:

(1) The average daily balance of moneys in the Indian gaming fund during the period of time specified under this subsection as certified to the board by the director of accounts and reports; and

(2) the average interest rate on repurchase agreements of less than 30 days' duration entered into by the pooled money investment board for that period of time. On or before the fifth day of the month for the preceding month, the director of accounts and reports shall certify to the pooled money investment board the average daily balance of moneys in the Indian gaming fund for the period of time specified under this subsection.

(e) Any appropriation or transfer of state general fund moneys for the operation of the division of Indian gaming or for any other expenses incurred by the state in carrying out duties imposed by a gaming compact or in monitoring class III gaming activities pursuant to a gaming compact shall be considered a loan and shall be repaid with interest to the state general fund in accordance with appropriation acts. Such loan shall not be considered an indebtedness or debt of the state within the meaning of section 6 of article 11 of the constitution of the state of Kansas. Such loan shall bear interest at a rate equal to the rate prescribed by K.S.A. 75-4210 and amendments thereto for

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inactive accounts of the state effective on the first day of the month during which the appropriation or transfer takes effect.

(f) At the time of repayment of a loan pursuant to subsection (e), the director of Indian gaming shall certify to the director of accounts and reports the amount to be repaid and any interest due thereon. Upon receipt of such certification, the director of accounts and reports shall promptly transfer the amount certified from the Indian gaming fund to the state general fund.

Sec. 7. K.S.A. 21-4302 is hereby amended to read as follows: 21-4302. (1) A "bet" is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement. A bet does not include:

(a) Bona fide business transactions which are valid under the law of contracts including, but not limited to, contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation for loss caused by the happening of the chance including, but not limited to, contracts of indemnity or guaranty and life or health and accident insurance;

(b) offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such a contest;

(c) a lottery as defined in this section;

(d) any bingo game by or for participants managed, operated or conducted in accordance with the laws of the state of Kansas by an organization licensed by the state of Kansas to manage, operate or conduct games of bingo;

(e) a lottery operated by the state pursuant to the Kansas lottery act; ~~or~~

(f) any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas parimutuel racing act; or

(g) Indian gaming activities.

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(2) A "lottery" is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance. As used in this subsection, a lottery does not include:

(a) A lottery operated by the state pursuant to the Kansas lottery act; or

(b) Indian gaming activities.

(3) "Consideration" means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant.

Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration.

As used in this subsection, consideration does not include:

(a) Sums of money paid by or for participants in any bingo game managed, operated or conducted in accordance with the laws of the state of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate or conduct bingo games under the laws of the state of Kansas and it shall be conclusively presumed that such sums paid by or for such participants were intended by such participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations, as set forth in the appropriate paragraphs of subsection (c) or (d) of section 501 of the internal revenue code of 1986 and as set forth in K.S.A. 79-4701 and amendments thereto;

(b) sums of money paid by or for participants in any lottery operated by the state pursuant to the Kansas lottery act; ~~or~~

(c) sums of money paid by or for participants in any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas parimutuel racing act; or

(d) sums of money paid by or for participants in Indian gaming activities.

(4) A "gambling device" is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device.

(5) A "gambling place" is any place, room, building, vehicle, tent or location which is used for any of the following: Making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling devices. Evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places is admissible on the issue of whether it is a gambling place.

(6) "Indian gaming activities" means gaming activities that are conducted on Indian lands and are lawful pursuant to the Indian gaming regulatory act (25 U.S.C. 2701 et seq.).

Sec. 8. K.S.A. 1992 Supp. 21-4306 is hereby amended to read as follows: 21-4306. (1) Dealing in gambling devices is manufacturing, transferring or possessing with intent to transfer any gambling device or subassembly or essential part thereof.

(2) Proof of possession of any device designed exclusively for gambling purposes, which device is not set up for use or which is not in a gambling place, creates a presumption of possession with intent to transfer.

(3) Dealing in gambling devices is a class E felony.

(4) It shall be a defense to a prosecution under this section that the gambling device is an antique slot machine and that the antique slot machine was not operated for gambling

purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured prior to the year 1950.

(5) It shall be a defense to a prosecution under this section that the gambling device or subassembly or essential part thereof is manufactured, transferred or possessed by a manufacturer registered under the federal gambling devices act of 1962 (15 U.S.C. 1171 et seq.) or a transporter under contract with such manufacturer with intent to transfer for use:

(a) By the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission;

(b) by a licensee of the Kansas racing commission as authorized by law and rules and regulations adopted by the commission; ~~or~~

(c) in a state other than the state of Kansas; or

(d) in Indian gaming activities.

Sec. 9. K.S.A. 1992 Supp. 21-4307 is hereby amended to read as follows: 21-4307. (1) Possession of a gambling device is knowingly possessing or having custody or control, as owner, lessee, agent, employee, bailee, or otherwise, of any gambling device.

Possession of a gambling device is a class B misdemeanor.

(2) It shall be a defense to a prosecution under this section that the gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured prior to the year 1950.

(3) It shall be a defense to a prosecution under this section that the gambling device is possessed or under custody or control of a manufacturer registered under the federal gambling devices act of 1962 (15 U.S.C. 1171 et seq.) or a transporter under contract with such manufacturer with intent to transfer for

use:

(a) By the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission;

(b) by a licensee of the Kansas racing commission as authorized by law and rules and regulations adopted by the commission; ~~or~~

(c) in a state other than the state of Kansas; or

(d) in Indian gaming activities.

Sec. 10. K.S.A. 21-4302 and K.S.A. 1992 Supp. 21-4306 and 21-4307 are hereby repealed.

Sec. 11. This act shall take effect and be in force from and after its publication in the Kansas register.

KICKAPOO NATION POSITION PAPER
KICKAPOO NATION - KANSAS GAMING COMPACT
By Lance W. Burr, Attorney General for
Kickapoo Nation
(Endnotes to be provided later)

When the United States Congress enacted the Indian Gaming Regulatory Act (IGRA) on October 17, 1988, it did so with the understanding that Indian Nations were to be afforded the opportunity to be the primary beneficiaries of gaming operations on Tribal land.[1] Congress concluded that the principal goal of Federal Indian policy is to promote economic development, self-sufficiency and strong Indian Nation governments.[2] Indian Nations were to have the exclusive right to regulate gaming activities on Indian land if not prohibited by federal law and if the gaming activity occurs within a state which does not prohibit gambling.[3] Indeed, Congress even established an independent federal regulatory authority to protect Indian gaming activity as a means of generating much needed revenue for essential Indian Nation governmental services.[4]

So why is it that the people of the Kickapoo Nation (located in northeast Kansas) have been deprived of the benefits of IGRA? Once again, the federal government has failed to fulfill its trust responsibilities to the Kickapoo people as required by treaty law. And once again, the State of Kansas has seized upon the opportunity to delay and to infringe upon the federal right of the Kickapoo people to enjoy the benefits and opportunities promised to them with the passage of IGRA.

THE KICKAPOO NATION SURROUNDED BY KANSAS

The Kickapoo people have had a long history of opposing

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intrusions on their sovereignty by the State of Kansas. The Kickapoo Nation along with other Indian Nations located within the boundaries of the United States have been recognized as distinct, independent communities with inherent rights to exercise powers of self-government, not because those powers were delegated to them by the United States, but because of their aboriginal sovereignty which predates the formation of the government of the United States.[5] The Courts have considered treaties and statutes enacted by Congress as limitations upon original Tribal powers rather than the founding source of those powers.[6]

Although the Kickapoo Nation operates through a Constitution and a Code of Laws, its legal authority is derived from the will and desire of the members of the Kickapoo Nation to rule themselves without interference from other sovereign powers. The Federal Courts of the United States have consistently confirmed the fact that treaties with Indian Nations have the same legal import as treaties with foreign nations notwithstanding the fact that later decisions characterized Indian Nations as "dependent sovereign nations". The United States Supreme Court in the landmark case of Worsester vs Georgia (1832) supra established the basis for Indian self-government and self-determination in an opinion that has been consistently followed by United States Courts for 160 years.

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> "The Indian Nations had always been considered as distinct, independent, political communities, (p.559)... and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self-government-by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.
>
> The Cherokee Nation, then, is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."

Traditionally the states have had no right to infringe upon the federal government's power to regulate relations with members of the Indian Nations and Indian Nations have been subject to federal law to the exclusion of state law and have been empowered to exercise their inherent rights of self-government as long as they were consistent with federal law. Indeed, Kansas could not have become a state without promising to honor the sovereignty of the Kickapoo Nation located on territory which is now known as Kansas. In "An Act for the Admission of Kansas into the Union",

passed January 29, 1861, the United States of America accepted Kansas into the Union with these very important conditions:

> "...that nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty (with) such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States to be included within said state..."

As pointed out in the landmark case of Parker vs Windsor,[7] Kansas accepted admission into the Union on the condition that Indian rights remain unimpaired as required by this most significant part of the Kansas Constitution.[8] A recent Kansas State Board of Tax Appeals case and a Kansas State District Court opinion have affirmed the conclusions reached by the Kansas State Supreme Court in these landmark decisions of the 1800's.[9]

Once these historic legal principles are understood, it is easy to see why the Kickapoo people have steadfastly maintained that they have no legal relationship with the State of Kansas, but only with the United States government because of treaty provisions, congressional enactments, and federal judicial decisions.

In order to better understand the disappointment,

frustration and anger of the Kickapoo people over the lost jobs and revenue guaranteed by IGRA, it might be instructive to know that the Kickapoo people were forcibly removed from their homeland near the Great Lakes region in north central United States during the late 1700's and early 1800's. Pursuant to the Caster-Hill Treaty of October 24, 1832, the Kickapoo people were removed to the northeast part of Kansas and their territory was reduced from several million acres to 768,000 acres, which included the City of Leavenworth and the Missouri River almost up to the Nebraska border on the eastern boundary, and Highway 75 coming out of Topeka, Kansas, on the western boundary. This was to be the home of the Kickapoo people forever and the first part of Article II of the Treaty provided:

> "The United States will provide for the Kickapoo Tribe a country to reside in southwest of the Missouri River, as their permanent place of residence as long as they remain a Tribe." (Emphasis added.)

As we now know, that Treaty provision as well as numerous others have not been honored either by the United States or the State of Kansas. Subsequent treaties were signed by persons who were not always the legal representatives of the Kickapoo people and these treaties were obtained through duress, fraud and misrepresentation. Landholdings of the Kickapoo Nation have been reduced to approximately 6,000 acres. However, the Kickapoo people have never lost criminal or civil jurisdiction over all

territory within their reservation boundaries. On February 26, 1937, the United States government approved the Constitution and By-laws of the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas and since that time the Kickapoo Nation has been governing the activities within its Reservation boundaries pursuant to the provisions of that Constitution. Article I-Territory provides:

> "The jurisdiction of the Kickapoo Tribe shall extend to the territory within the confines of the Kickapoo Reservation as defined under the Treaty of May 18, 1854, and to such other lands as may be hereafter added thereto under any law of the United States."

Article III of the Kickapoo Constitution provides that the governing body of the Kickapoo Nation shall be the Tribal Council which is composed of seven members elected by the general membership of the Kickapoo Nation. The General Council consists of all members of the Kickapoo Nation and they retain the ultimate power in controlling who shall represent the interests of the Nation.[10] Article IV sets forth various enumerated powers allowing the Kickapoo Nation Tribal Council to govern all activities within Reservation boundaries. Section 1, subparagraph (J) provides, in part:

> "The Tribal Council of the Kickapoo Tribe shall exercise the following powers subject to any limitations imposed by the statutes or the Constitution of the United States:
>
> (J) To govern the conduct of persons on the reservation: and to provide for the maintenance of law

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and order and the administration of justice by establishing appropriate courts on the reservation and defining their duties and powers."

In past years, the Kickapoo Nation Tribal Council served as an interim court, but during the last two years, the Nation has been served by a newly established Tribal Court system which includes District Court Judges and a Kickapoo Nation Supreme Court consisting of three Supreme Court Justices. The Kickapoo Nation Tribal Code governs all civil matters on the Reservation and the Nation is exercising limited criminal jurisdiction pursuant to a Criminal Code of Laws.

BACKGROUND TO IGRA

Against this backdrop of an exclusive relationship with the federal government, and because of the United States' trust responsibilities to the Indian Nations pursuant to treaties and congressional enactments, the United States Congress first examined the possibility of utilizing a federal commission that would have shared responsibility with the Indian Nations in regulating Indian gaming. Indian Nation leaders favored this arrangement because it would continue the traditional relationship between the federal government and the Indian Nations. Gaming activities would be governed by a compact between the United States and the various Indian Nations. Indian leaders felt that this would be the proper way to diffuse state resentment to Indian gaming operations which had begun to

flourish in the 1970's as a result of the Seminole Tribe of Florida opening high stakes bingo games on their Tribal land. Following the success of the Seminole Tribe, jealous state officials emphasized the need for federal or state regulation of Indian gaming in addition to or rather than self-regulation by Indian Nations. State officials objected to Indian bingo and other Indian gaming activities on the grounds that such enterprises would be infiltrated by organized crime. However, the real reason for the objections was the perceived notion that Indian gaming operations might jeopardize the states' rights to make money off similar gambling activities. The United States District Court for the Fifth Circuit held that the Florida Seminoles could operate high stakes bingo without interference from the state because the federal government had never authorized the State of Florida to impose gaming regulatory laws on Indian lands.[11] At the same time, litigation had been spawned by bingo games in other parts of the country and in 1987 the United States Supreme Court rendered the landmark Cabazon decision wherein the Court held that California's regulation of bingo and other gaming activities could not be used to prohibit the Cabazon Tribe from engaging in such activities on their reservation.[12]

Following Cabazon, Nevada-New Jersey casino owners and the leaders of several states stepped up pressure on congressional

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leaders to introduce a bill that would force Indian Nations to relinquish sovereign rights to the states with regard to gaming operations on Indian Nation land. Objections by Kickapoo Nation Tribal leaders and the vast majority of elected leaders of other Indian Nations in the United States went unheeded and the states won out the right to force Indian Nations to negotiate what types of gaming activities would take place on Indian land.[13]

INDIAN GAMING REGULATORY ACT

Ostensibly, IGRA was passed by Congress to fulfill its historical trust obligation to guarantee that Indian Nations' interests and assets are guarded against encroachments by individuals, the states and even federal agencies. Unfortunately for the Kickapoo Nation, none of the findings and declarations by Congress in IGRA have been honored or fulfilled. The present controversy in Kansas concerning Indian gaming emanates from the fact that Congress has attempted to illegally co-mingle the sovereign rights of both the State of Kansas and the Four Indian Nations located within its borders.[14] The Act creates three forms of gaming and establishes an extensive regulatory scheme for such gaming: Class I gaming consists of social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in as a part of, or in connection with, Tribal ceremonies or celebrations.[15] Such gaming is controlled exclusively by the Kickapoo Nation and is not subject to the

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provisions of IGRA. Class II gaming includes games of chance, commonly referred to as BINGO, including pull tabs, Lotto, punch boards, tip jars, instant BINGO and other similar games. IGRA excludes electronic or electro-mechanical facsimiles of any game of chance or slot machine of any kind from Class II gaming. Non-banking card games are permissible, but banking card games where the players play against the house are included under Class III gaming.[16] Class II gaming is not subject to state regulation but is regulated by the National Indian Gaming Commission, which is a three-member appointed commission within the Department of the Interior. Class III gaming consists of all other types of gambling, including banking card games such as Black Jack, and slot machines, pari-mutual racing, and electronic games of chance such as video poker. Under IGRA, the Kickapoo Nation is prohibited from conducting Class III gaming until the Tribe has entered into a Gaming Compact with the State of Kansas for the operation of such games.

IGRA requires good faith negotiation on the part of the State of Kansas but is silent as to what constitutes good faith. We do know that any demand made by the State of Kansas for direct taxation of the Indian Nation or of any Indian lands constitutes evidence that the State has not negotiated in good faith.[17] IGRA does place the burden of proof on the State to prove that it negotiated in good faith.[18]

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IGRA is very specific concerning the procedure to be used by Indian Nations and the states with regard to the compacting process. The Act provides that the Indian Nation must have jurisdiction over the Indian lands upon which a Class III gaming activity is to take place. A Tribal-State compact may include provisions relating to civil and criminal regulatory laws of both the nation and the state that directly bear on the licensing and regulation of the activities.[19] For that purpose, criminal and civil jurisdiction may be divided between the state and the nation for the purpose of enforcing laws and regulations governing gaming activities. The state is entitled to receive enumeration to defray the costs of regulating such activity. However, Congress was adamant that state taxes, fees, charges or other assessments could jeopardize the compacting process and therefore it provided that the state may not refuse to enter into negotiations just because it has no right to impose taxes, fees, charges or other assessments.

Congress made it clear that the United States District Courts are to have jurisdiction over any actions initiated by an Indian Nation arising from the failure of the state to enter into negotiations. IGRA provides that an Indian Nation may sue the state in the United States District Court if the state does not respond to a request to negotiate a compact to its conclusion within 180 days after being requested to do so by the Nation or

if the state does not respond to the request to negotiate in good faith. The burden of proof is placed on the state to prove that it negotiated in good faith to conclude a Tribal-State compact. If the Federal District Court finds that the state has failed to negotiate in good faith to conclude the compact, the Court shall order the state and the Nation to conclude such a compact within a 60-day period. IGRA is specific as to what the Court may consider in its determination as to whether a state has negotiated in good faith. The Court may take into account public interest, safety, impact on criminal activity, financial considerations and adverse economic impacts on existing gaming activities. Also the Court can consider any demand by the state for direct taxation as evidence of lack of good faith negotiations.

In order to make sure that the state could not indefinitely prolong the conclusion of a Tribal-State compact, Congress provided that if the state and Indian Nation fail to conclude a Tribal-State compact within the 60-day period as set forth in the order of the Court, then the Indian Nation and the state shall each submit to a mediator appointed by the Court, a compact that reflects their last best offer. The mediator is then required to select from the two proposed compacts the one which best complies with the terms of the act and with applicable federal law and with the findings and order of the Court. The mediator is then

to present the compact to the state and the Indian Nation and if the state consents to the compact within 60 days after being submitted to the state, then the compact is finalized. If the state does not consent during the last 60-day period, the mediator shall notify the Secretary of the Interior and the Secretary shall prescribe, in consultation with the Indian Nation, procedures which are consistent with the compact selected by the mediator, IGRA and relevant state laws. The Secretary of the Interior may disapprove the compact only if it violates any other provisions of IGRA, provisions of federal law that do not relate to gaming matters, or the trust obligations of the United States to Indians. If the Secretary does not approve or disapprove the compact within 45 days, it is deemed approved, but only to the extent it is consistent with the provisions of IGRA.[20]

Indian gaming activities are highly regulated pursuant to IGRA. First, the Indian Nations must adopt ordinances or codes of law regulating gaming activities. The Act also establishes a National Indian Gaming Commission consisting of three full time members. The chairperson is to be appointed by the President of the United States with the advice and consent of the Senate, and the two associate members are to be appointed by the Secretary of the Interior. The powers of the chairperson are extensive and include his or her right to issue orders to temporarily close

gaming activities, levy and collect civil fines for violations of the Act, approve tribal ordinances regulating Class II and III gaming, and approve management contracts for Class II and III gaming. Also the chairperson will have such other powers as may be delegated to him or her by the commission. In general, the commission has extensive regulatory powers over Class II and Class III gaming. In addition, the Indian Nation may license and regulate Class II gaming on Indian lands if the gaming is located within the state that permits such gaming for any purpose by any person, organization or entity or if gaming is not prohibited by federal law. Class III gaming activities may be conducted on Indian lands only if the activities are authorized by a Tribal ordinance meeting requirements of the Act and approved by the chairperson of the commission. Likewise, the gaming activities must be located in the state that permits such gaming for any purpose by any person, organization or entity. Finally, the gaming activity must be in conformance with the Tribal-State compact.

The Act anticipates that the Indian Nation might choose to hire a management company to conduct the day-to-day operation of the gaming activities. The activities of the management company are highly regulated under the Act and the management contract cannot be for a term exceeding seven (7) years and the Nation must receive at least 60 percent of the net proceeds from the

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gaming operation. Indian gaming operations throughout the country will be the most highly regulated of all gaming operations, be they state, private or otherwise. In the case of the Kickapoo Nation-Kansas Gaming Compact, the gaming operations will be scrutinized by the Federal Bureau of Investigation and the Justice Department, the State of Kansas Gaming Agency, the National Indian Gaming Commission, and the Kickapoo Nation Tribal Gaming Commission or Agency. Both the Kickapoo Nation and the State of Kansas shall exercise concurrent criminal jurisdiction over Indian people pursuant to 18 U.S.C. 3243,[21] but the compact provides that primary responsibility for criminal jurisdiction over Indian people shall rest with the Tribe and the State shall exercise criminal jurisdiction only in emergency situations or in the event that the Tribe fails to fulfill its responsibilities. With regard to non-Indian persons, the State of Kansas shall exercise exclusive criminal jurisdiction. The Compact also provides for a cross-deputization agreement with Kansas and the Kickapoo Nation to facilitate cooperation between State and Tribal law enforcement personnel. The compact further provides that nothing contained in it will modify or limit existing federal criminal jurisdiction over Kickapoo gaming operations.

It is readily apparent that the Kickapoo Nation is giving up a part of its sovereignty when in the Gaming Compact it allows the State of Kansas to exercise jurisdiction on Kickapoo Nation

Reservation Trust land - land that constitutes no part of the State of Kansas.[22]

WHY GAMBLING FOR THE KICKAPOO NATION

Since IGRA was passed in October 1988, the elected officials of the Kickapoo Nation have had several years to consider the question of whether or not to engage in Class III gaming. Like any elected officials, the governing body of the Kickapoo people must provide revenue to operate their government. The decision to construct and operate a destination gaming resort was based on economic considerations and the need to raise money to fund essential government services for the people. Numerous proposals for economic development have been considered over the years, but due to the remoteness of the Kickapoo Nation Reservation, business investors have declined to locate on or near the Reservation.[23] With unemployment ranging in the 60-80% range; with inadequate health care services being available for Kickapoo people; and with housing and educational opportunities being severely limited, elected officials of the Kickapoo Nation determined that they had no viable alternative other than to pursue economic self-sufficiency through the operation of a destination gaming resort facility. Equally disadvantaged due to their location and other factors, the citizens of Horton and Hiawatha (cities nearest to the Kickapoo Nation Reservation) banded together to form a strong coalition in support of the

Kickapoo Nation's gaming facility. Each city wanted it located nearest them, but due to the need for adequate utilities and water, Hiawatha was the better site. However, the Kickapoo Nation Tribal Council had not considered locating the gaming facility near Hiawatha until they were overwhelmed by requests of the citizens of Hiawatha to have them as their neighbors in what has proven to be a historic joint venture. The sincerity of the people of Hiawatha and the tremendous amount of time and energy that they have put into supporting the Kickapoo Nation gaming facility has made a significant impact on the Kickapoo people. As we attended meetings throughout the last year and one-half, we were reminded on many occasions that it was the first time, in as long as anyone could remember, that the governments of Horton, Hiawatha and the Kickapoo Nation all came together with full councils.[24] Now, 23 mayors and city councils throughout northeast Kansas have gone on record through petitions in full support of this Kickapoo Nation economic development project.[25]

The Kickapoo Nation Tribal leaders are fully aware of the tremendous benefits that have inured to states and foreign nations and to other Indian Nations and surrounding communities as a result of their good fortune in being able to have Class III gaming activities. Gambling has been recognized as the United States' largest industry surpassing the combined total volume of the 75 largest industrial organizations in the country, including

such giants as General Motors, U.S. Steel, and all the oil companies.[26] In 1984, Americans wagered twice as much as they spent on higher education, fifteen times what they donated to churches, and over half of what they spent on food.[27] The Kickapoo leaders also know that gaming has been an integral part of Indian life for thousands of years. Dice have been found in grave sites dating back to 40,000 B.C. Some of America's founding fathers were promoters of gambling and Benjamin Franklin organized a lottery in Pennsylvania in 1748 to raise funds for the purchase of military supplies. Lotteries were sponsored by George Washington for mountain road construction and by John Hancock for the rebuilding of Fanueil Hall in Massachusetts. In 1776 the Continental Congress organized a lottery with $5 million in prizes in order to raise money for the war against the English; George Washington purchased the first ticket. By 1832, 420 lotteries were being held in eight states in the new republic.[28]

In this century, Nevada had originally permitted gambling and later bowed to public pressure and ordered all gaming establishments to close their doors. However in 1931, the Nevada legislature once again legalized gambling due to the dire economic conditions of the depression. In recent years, Americans have been spending more money on gambling than ever before. In 1960, Americans spent $5 billion on legalized

gambling, and by 1974 this had risen to $17 billion. In 1984, Americans wagered an estimated $177 billion. During the 1980's dramatic growth took place with legalized gambling in the United States.[29] In 1991, gamblers in America bet $304.1 billion in casinos, on lottery tickets, horse and dog races, and other sporting events.[30] Now, except for Utah and Hawaii, it is legal to place a bet of some kind in every State of the Union.

The Kansas lottery has generated $115 million during the past five (5) years and lotteries are now legal in approximately 33 states. The world's richest lottery in Spain, the $1.1 billion Christmas Lottery, has been an annual event since 1818.[31]

In the area of Indian gaming, the United States Department of the Interior, Bureau of Indian Affairs, reports that as of October 8, 1992, there were 44 tribes with 57 Indian Nation-State gaming compacts in twelve different states.[32] The impact of Indian gaming for Tribes and for states is now significant and substantial. Indian Nation Reservation wagering totaled $5.44 billion in 1991 which doubled the 1990 record.[33] A brief review of the experiences in Minnesota and Michigan can be instructive to those who are judging the impact of Indian gaming on the Indian Nations and the states in the midwest. The Minnesota Indian Gaming Association (MIGA) conducted a study of the economic impact of Indian Nation gaming in Minnesota and analyzed the business operations of six Indian Nations which have just

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entered the gaming business within the last few years. During the fiscal year of 1991, the gaming operations of the Boris-forte Chippewa Tribe, the Leach Lake Chippewa, Lower Sioux, Mille Lacs Chippewa, Prairie Island Sioux and Shakapee Sioux produced $143 million in revenues after payouts. Expenditures amounted to $89 million which resulted in profits to the Indian Nations of $54 million. MIGA reports $32 million paid in wages and benefits and proudly reports that these proceeds are being used for purposes consistent with IGRA, such as funding Tribal government; providing for the general welfare of the Tribe; promoting economic development; contributing to charities; and helping fund local non-Indian agency operations. Proceeds are being used for direct human services, education, housing and infrastructure improvements as well as investments in Tribal business enterprises. Tribal gaming has resulted in more than 4,700 new jobs in Minnesota for persons working directly for Tribal gaming enterprises, and non-Indians have benefited from 80% of the new jobs.

A more startling revelation is the fact that the number of AFDC recipients decreased by 16% between 1987 and 1991 in the four non-urban counties with Indian Nation gaming facilities while the state-wide number of recipients increased 15% for the same period. Also the study identifies sources of indirect jobs derived from induced spending and construction activity in the

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amount of $69 million. It is estimated that that figure supports an additional 2,900 jobs. An estimated $38 million was spent constructing the gaming facilities through 1991 and an additional $37 million of construction work is scheduled for completion by the end of 1992. Estimates are that this activity will provide an estimated 2,400 construction related jobs. An additional $75 million of construction activity is planned for 1993 and beyond. The study estimates that out-of-state visitors spent approximately $26 million on various travel related goods and services in fiscal year 1991 and this level of spending created approximately 600 jobs.[34]

University Associates in Lansing, Michigan, compiled Indian gaming statistics which show that seven Indian Nation gaming establishments in Michigan employed 1,931 people, 62% of which were Indian persons. Thirty-seven percent of those employees were welfare recipients and 31% were unemployed prior to their employment in Indian casinos. As a result, unemployment rates on the Reservations have decreased by 64%, and from approximately November of 1991 to November of 1992, Indian casinos paid $3.9 million in state and federal employment taxes from an annual payroll of $13.5 million. Combined receipts of the seven Indian Nations totaled $41.8 million for 1991.[35]

The Indian Nations located in Michigan spent $8 million on supplies and services, 93.5% of which were purchased within the

state, and 80% of the customers spent tourist dollars in local restaurants, buying gasoline and other consumer items. Tribal leaders have indicated that gaming has had a very positive impact on employment of Tribal members, economic development of the Tribe and especially the surrounding non-Indian communities. This has resulted in more spending in both Tribal and non-Indian community businesses and increased tourism to the geographic areas where these casinos are located.[36]

As noted above, the findings of Congress in IGRA parallel the conclusions reached by Kickapoo Nation elected officials. Indian gaming should be used as a mechanism to promote economic development, self-sufficiency, and a strong Indian Nation government. IGRA was enacted to ensure that the Kickapoo Nation is the primary beneficiary of the gaming operation. So why has the State of Kansas failed to negotiate to its conclusion a Tribal/State gaming compact as required by federal law? What actions have the State of Kansas taken that would indicate that it has failed to negotiate with the Kickapoo Nation in good faith?

CHRONOLOGY OF EVENTS WITH KANSAS AND THE SECRETARY OF THE INTERIOR

Following the request made on August 28, 1991, by the Kickapoo Nation to negotiate a gaming compact with the State of Kansas, the Governor of Kansas concluded that she had the

authority to negotiate a compact with the Kickapoo Nation on behalf of the State of Kansas. Indeed, in the state of California, the governor negotiated and signed five compacts with Indian Nations without specific legislative authority authorizing the governor to do so.[37] The Secretary of the Interior approved those compacts without legislative approval. So the Governor of Kansas, in the very best of faith, instructed her staff to begin negotiations with the Kickapoo Nation to develop a gaming compact that would comply with the provisions of the Indian Gaming Regulatory Act while protecting the interests of the State of Kansas. On the 16th day of January, 1992, the Governor of Kansas, on behalf of Kansas, entered into a Kickapoo Nation-Kansas Gaming Compact with the Kickapoo Nation and sent the compact to the Secretary of the Interior, for approval. The question of who could negotiate and bind the State of Kansas was never specified in the Indian Gaming Regulatory Act. The Federal Act only refers to "the state". The decision as to whom or what entity the Secretary of the Interior shall accept as the signatory on behalf of a state is a federal question and should never have been presented to the Kansas State Supreme Court for their adjudication.[38]

Soon after the Kickapoo Nation-Kansas compact was sent to the Secretary of the Interior, the Attorney General of Kansas sent a one-and-one-half page letter (dated January 17, 1992) to

the Secretary of the Interior requesting that he not sign off on the compact as the Governor alone could not enter into the compact on behalf of the State of Kansas. On January 31, 1992, Governor Finney wrote to the Secretary of the Interior setting forth her legal authority to execute the compact on behalf of the State of Kansas and again the Governor requested that the Secretary of the Interior approve the compact pursuant to federal law. On February 5, 1992, Attorney General Stephan filed an original action in the Kansas Supreme Court seeking a determination of the scope of the Governor's authority to negotiate and execute Tribal-State compacts.[39]

In a letter dated February 28, 1992, Assistant Secretary Eddie Brown advised the Kickapoo Nation that Section 11 of the Kickapoo Nation-Kansas Compact violated IGRA because it permitted assessments by the State of Kansas over and above the State's actual regulatory costs. That same letter stated that the submitted compact between the Kickapoo Nation in Kansas and the State of Kansas is disapproved but it invited the Kickapoo Nation and the State to revise the compact and resubmit it. With that in mind, representatives of the Kickapoo Nation Tribal Council and the Governor's office met immediately and re-negotiated and revised Section 11 of the Compact to meet the objections outlined in Assistant Secretary (Brown's) letter. The revised compact was sent to Brown on March 2, 1992, and was received by him on March

4, 1992. Four days later, (Brown) acknowledged receipt of the revised compact and even though he stated that it met all requirements of IGRA, now he declined to either approve it or disapprove it. He said he was going to wait until the Kansas Supreme Court ruled on the question of the Governor's authority.

On July 10, 1992, the Kansas Supreme Court ruled that while the Governor had the authority to negotiate the Compact, action by the State legislature was necessary to make the compact binding on the State.[40] Assistant Secretary Brown returned the revised compact to the Kickapoo Nation on July 10, 1992, defending disapproval on the Kansas Supreme Court ruling.

Because of the Secretary of the Interior's failure to act within the statutory time periods of IGRA, the Kickapoo Nation filed suit against the Department of the Interior, Manuel Lujan, Secretary of the Interior, and Eddie Brown, Assistant Secretary of the Interior for Indian Affairs, on May 19, 1992, in the United States District Court for the District of Columbia.[41] The Kickapoo Nation seeks a declaratory judgment that the Kickapoo Nation-Kansas Gaming Compact has been entered into pursuant to IGRA and is valid and has been approved by operation of law because the Secretary of the Interior failed to approve or disapprove the compact within the statutory 45-day period provided for such action. The Secretary of the Interior denied the allegations, filed a motion to dismiss, or in the

alternative, for summary judgment, and the Kickapoo Nation moved for summary judgment. Briefs have been filed and oral arguments are pending.

Pursuant to IGRA, the State of Kansas has "180 days following the request by the Kickapoo Nation" to conclude the Indian gaming compacting process or be in violation of Federal law. Nevertheless, the Kansas Legislature chose not to take action on the Kickapoo compact during the 1992 legislative session. This was not a situation where time restraints prevented action or the Legislature did not have notice of its responsibilities. On September 30, 1991, the Kansas Attorney General informed the Kansas Legislature that they must take legislative action with regard to the compact.[42] The Governor of the State of Kansas signed the Kickapoo Nation-Kansas Gaming Compact on January 16, 1992, leaving the Legislature the entire session to provide a mechanism to conclude the compacting process. Instead of dealing with the issue in a good faith manner, the legislature introduced a series of bills designed to sabotage the efforts of the Kickapoo Nation to conclude the compacting process with Kansas, while at the same time, expanding the right of the State to engage in additional gaming activities, specifically Instant Lottery, Keno and Lotto games.[43]

Since Kansas, through the Kansas Legislature, chose not to conclude the compacting process in good faith and did not comply

with the provisions of IGRA, the Kickapoo Nation filed suit against the State of Kansas on October 1, 1992, in the United States District Court for the District of Kansas,[44] alleging a failure of the State of Kansas to negotiate in good faith to conclude and bind the State of Kansas to a Tribal-State gaming compact as required by IGRA. The suit further alleges that the failure of the State of Kansas to provide a mechanism to conclude the compacting process has created extreme economic hardships for the Kickapoo Nation, including the loss of significant tribal revenues and the loss of needed employment opportunities. The Kickapoo Nation is requesting that the Court enter a declaratory judgment that Kansas failed to provide a mechanism to conclude the compacting process and as such, that constituted a failure to conduct the negotiations in good faith in violation of IGRA. The Nation further requests that the Court intervene as provided by IGRA and conclude the Tribal-State Compact within a 60-day period after the Court's order.

THE LEGAL CONTROVERSY

Certain opponents of the Kickapoo Nation's efforts to establish a Las Vegas style casino on their land contend that Kansas law does not allow for casino-style gambling. However, the Attorney General of Kansas has opined that because of the Constitutional Amendments made in 1986 by the Kansas people, all forms of gambling, including Las Vegas style gambling, can be

conducted by the Kickapoo Nation. Opponents to the Kickapoo Nation gaming facility also raised the point that the 11th Amendment to the United States Constitution prohibits the suit by the Kickapoo Nation brought to remediate the State's failure to negotiate in good faith.[45] Lower Federal Courts have disagreed concerning this issue with some courts finding that §25 U.S.C. 2710 D (7)(a)(1) constitutes a clear statement of waiver of sovereign immunity,[46] while others hold that the 11th Amendment bars suits against the state by the Indian Nation regardless of the waiver set forth in IGRA.[47]

Senator Inouye of Hawaii, who is the Chairman of the Select Committee on Indian Affairs, and who was the primary sponsor of IGRA, has been outraged by the States speaking with "forked-tongues." In his statement at the May 6, 1992, oversight hearing on the implementation of IGRA, Senator Inouye pointed out that only the federal government and the Indian Nations were included in the original IGRA because that continued the traditional relationship of the federal government with Indian Nations. Such relationship excluded the States. When this was made known, the States vigorously argued that they must be allowed to play some role in the determination of what gaming activities would be conducted on Indian Nation Reservations. He pointed out to the committee that it was the States who advocated for a Tribal-State compact provision in the Act, and it was the States that wanted

to negotiate with Indian Nations on a government-to-government basis.[48] He is greatly angered now that the States seek to avoid the compacts based on the 11th Amendment defense and that as a result of this, negotiations with Indian Nations such as the Kickapoo Nation have come to an impasse. He asked the States these threshold questions: If the States don't want a federal commission; if the States don't want Tribal-State compacts; if the States don't want the Secretary of the Interior to prescribe compacts; if the States don't want the Secretary of the Interior to prescribe procedures for the conduct of Class III gaming on Indian lands; then what do the States want? He then asked the States "so I ask, what say you States? If it is your intention to make a dead letter of the law - the Indian Gaming Act - then by your actions you will compel our action." He concluded his remarks by observing that "this is unfair to the Indian Nations, and I for one, charged with the duties of the supreme trustee, will not allow this situation to continue. I will look for a response but I will also take action. I will not ask the Tribal governments to wait for six months or a year - I will not ask the Indian Nations to forego the limited economic opportunities that gaming operations afford to them for the several years that it may take to appeal these 11th Amendment cases to the Supreme Court."[49]

The State of Kansas, through its Attorney General, is one of

the states that has threatened to raise the 11th Amendment defense against the Kickapoo Nation in its suit in Federal District Court. However, in order to afford the 1993 Kansas Legislature the opportunity to take action to ratify the compact negotiated by the Governor, the Kickapoo Nation and the Attorney General of Kansas have reached an agreement which has been approved by the Federal District Court whereby the State of Kansas is given until February 12, 1993, in which to answer the Complaint alleging a lack of good faith negotiation on the part of the State of Kansas.[50] In so doing, the Attorney General has agreed not to raise the 11th Amendment sovereign immunity defense with the expectation that the Legislature will take action and the Complaint filed by the Kickapoo Nation will become moot. However, the Federal District Court Judge has placed this case on the fast track and has entered a scheduling conference order which provides that all briefs, discovery and responses thereto will be filed on or before March 22, 1993. Should the Legislature fail to take action during the first part of the 1993 Legislative session, the court will render an opinion concerning the jurisdictional issues and the merits of the case in the early part of April, 1993.

It is hoped that this unique agreement between the Kickapoo Nation and the Attorney General's Office representing the State of Kansas will provide the incentive to the 1993 Kansas

Legislature to approve the negotiated compact, either through a delegation of power to the appropriate entity, or by legislation approving the compact.

THE GREAT MIRAGE

Recently the newly elected Speaker of the Kansas House of Representatives and the current President of the Kansas Senate and other legislative leaders have agreed that it is time that the Legislature come to grips with the Indian gaming issue whether Kansas lawmakers approve of gambling or not.[51] But just as it appears that some legislative action will be taken, the powerful Mirage Resorts, Inc., a Las Vegas based casino management corporation which owns some of the largest casinos in the world, has announced that it is working with city and county officials of Kansas City, Kansas, Wyandotte County, to obtain the passage of a constitutional amendment to permit casino gambling in Kansas City, Kansas. It is ironic and predictable that this marriage between Mirage Resorts, Inc., and Kansas City, Kansas, is taking place. Mirage Resorts, Inc. had teamed up with the Sac and Fox Nation of Missouri to manage and operate a casino for that Indian Nation. But that union is no more and the elected officials of the Kickapoo Nation are concerned that such a union between Mirage Resorts, Inc., and Kansas City, Kansas, will birth a powerful lobbying effort to cut the legs out from under Indian gaming. The Mayor of Kansas City has said that the City of

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Kansas City will push for a constitutional amendment to permit the ownership of casinos by non-Indians in Kansas City, Kansas. He has also said that the City's number one legislative priority is to provide increased employment opportunities, tourism and tax revenues by the establishment of a theme casino destination resort in conjunction with the present Woodlands facility, which is a dog and horse racing park near Kansas City, Kansas.

At a time when the United States Supreme Court and the states are mounting their most aggressive attack on Indian sovereignty, it is legally and morally improper to delay the Kickapoo Nation their lawful right to conduct gaming operations on its Reservation.[52]

I have heard many non-Indians say that the Indian people have been deceived and swindled out of their lands and out of treaty annuities in the past and that something should be done today to make up for those atrocities. The 1993 Kansas Legislature has a unique opportunity to foster a new attitude and policy towards the Kickapoo Nation and the other three Indian Nations surrounded by Kansas. If they refuse to take meaningful action, the Federal District Court, through an appointed mediator, may order that the compact negotiated by the Governor of Kansas be sent to the Secretary of the Interior for his approval. The Secretary has already ruled that the Kickapoo Nation-State of Kansas Gaming Compact is proper and complies with

all of the provisions of IGRA.[53] As Senator Inouye has asked, "What say you, States. Will you proceed to implement federal law?"

Prairie Band of Potawatomi Indians

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913 966-2255

Testimony Presented to the
House Federal and State Affairs Committee
By George Wahquahboshkuk, Chairman of the Tribal Council
Prairie Band of Potawatomie Indians

January 12, 1993

Chairman Graeber, members of the committee, I am George Wahquahboshkuk, representing the Prairie Band of Potawatomie Indians. I appreciate the opportunity to share my thoughts about Indian gaming and to provide some specific suggestions regarding House Bill 2023.

Tribal gaming is changing the lives of many Indian people. And yet, for all that it's doing for Native Americans, it may be doing even more for non-Indian people. For example, of 12,000 new jobs directly created by tribal gaming in Minnesota, 80% are held by non-Indian people. Consider the economic impact Indian casinos have on the community as a whole: It is estimated that it costs the public sector between $5,000 and $10,000 to create to single job. When this range is applied to just three of the Indian communities with gaming enterprises in the state of Minnesota, it translates to a savings of between $10 million and $20 million tax dollars.

Indian casinos are also helping thousands of people become economically independent. While welfare recipients for all of Minnesota increased by 15%, recipients for counties with Indian

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gaming decreased by 16%. And the economic impact of taxes paid as a direct result of jobs created by tribal government gaming in 1991 totaled $21 million in Minnesota alone.

In 1991, tribal government casinos donated tens of thousands of dollars to schools, universities and charities in Minnesota. Many tribal casinos also voluntarily pay annual fees to city or state governments as part of special agreements to cover services such as fire, police, sewer, water and roads. In fact these voluntary shared costs exceeded $700,000 for one tribe alone in 1991. These many contributions were made despite the fact that 44% of Indian people continue to live in poverty and 62% remain unemployed. A fact that demonstrates the Indian tradition of giving and sharing with the entire community, not just among Indian people.

Tribal gaming has given Native Americans a chance to finally regain the self-respect and economic self-sufficiency that 200 years of federal and state managed economic development programs have failed to provide.

There are those who, through ignorance or greed, would take this opportunity away from the tribes. But they are ignoring the fact that this would hurt more than just Native Americans.

In reviewing HB 2023, I believe that a 10 member committee, which seems to have the power to renegotiate the compact already negotiated by the Governor of Kansas and the Prairie Band of

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Potawatomie Indians, is so cumbersome that it becomes unworkable. We believe the existing compact is fair and protects the state's as well as the tribe's interests. As a compromise we would suggest this committee look at the Minnesota model which creates a 3 member negotiating team: the Governor or Governor's designated representative, as well as one member from the House and one member from the Senate. This team would report to the House and Senate Federal and State Affairs Committees annually.

Additionally, we believe that a public hearing by a legislative committee of the terms of the negotiated compact violates the rights and responsibilities of the two sovereign governments in their relationship with one another. I want to emphasize once again that the tribe merely seeks to implement its right to conduct Indian gaming on or adjacent to our reservation.

As a result we can create needed jobs - jobs that will allow Indian people to develop management skills. The casino project will provide dollars for tribal investments in much needed social programs, infrastructure projects and small businesses.

In conclusion, we ask for the simplest, workable procedure for the State of Kansas and the Prairie Band of Potawatomie Indians to move ahead.

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Comparison of State Laws Regarding Tribal-State Gaming Compacts

STATE	QUESTIONS	
Issue:	**Who has power to compact?**	**Hearing required?**
California	Racing Board	No
Colorado	Governor	No
Iowa	Director of Inspections and Appeals	No
Louisiana	(1) 5-Member Indian Gaming Commission negotiates (2) Governor approves	No
Minnesota	Governor with Attorney General's Advice	No
Oklahoma	(1) Governor negotiates (2) 10-Member Joint Committee on State and Tribal Affairs approves (the model Kansas seeks)	No
South Dakota	Governor	Yes
Washington	(1) 9-Member Gambling Commission negotiates (2) Legislature renegotiates (2) Governor approves	Simultaneous Hearings: (1) Legislative Headings (2) Gambling Commission Hearings
Wisconsin	Governor	No

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STATE OF KANSAS

GALEN WEILAND
REPRESENTATIVE, FORTY-NINTH DISTRICT
DONIPHAN COUNTY AND
BROWN COUNTY EXCEPT
POWHATTAN TOWNSHIP
P.O. BOX 146
BENDENA, KS 66008

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: INSURANCE
MEMBER: AGRICULTURE
PUBLIC HEALTH AND WELFARE

MR CHAIRMAN AND MEMBERS OF THE COMMITTEE,

My name is Galen Weiland. I represent the 49th district, Brown and Doniphan County. There are 3 reservations in my district and I support the Indian Nation legal right to conduct Class 3 gaming activities. Two weeks ago I traveled to Minnesota at my own expense, and toured the Mystic Lake Casino, a first class operation and saw first hand the economic benefits to the tribe. No one is on welfare and the members are building new homes in their own housing development, constructing a new tribal office and community center complete with day care facilities for the community, and more building plans for the future. Each person can go to the college of their choice. Many members are finishing their education, all with the funds from Mystic Lake Casino.

I believe the interest of the State would be best served if we would get this process of ratifying gaming compacts in place before the February 12th date when the Federal Judge is going to assess the progress the state has made in gaming compact approval.

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We're here today to you the truth as we see it. When the Kickapoo Indian Nation proposed locating a casino less than two miles south of Hiawatha, I too had my doubts. Gambling carries with it a stigma. We heard the fears a thousand times when the Legislature considered approving the lottery. Now six years later we all know the stories were unfounded. We don't have lottery addicts living in boxes spending their last dollar for a scratch card.

All this ran through my mind as I considered the affects a casino would have on Hiawatha. This is where my family lives, a ~~small country~~ town that survives mainly on the whims of the uncertain agricultural market. But I decided to check out Indian gaming for myself. I and a small group traveled to the Treasure Island casino near Red Wing, Minnesota. We went looking for the dark part of gambling, prostitutes, drugs, the mafia and gambling addicts.

What we found was a small Midwestern town thriving on a booming tourism trade. Not a single empty store front was to be found in downtown Red Wing. But we didn't stop there. We scheduled meetings with local clergy, law enforcement, health care officials, school officials, businessmen and the city administrator and mayor. Our goal was to seek out the unpleasant side effects gambling had brought with it. We turned over the rocks. We even sought out people from a list composed by a Hiawatha casino opposition group sure they would have tales of the Indian casino's contamination.

But even the local newspaper lacked a negative story. The stories they gave us had headlines like, "Treasure Island attracting over 6,000 a day." The casinos only rocky period had come when the Prairie Island Souix council decided to buy out Treasure Island's management and hire their own team. Even that, ~~though~~, didn't keep the crowds from coming. And Treasure Island, which employs more than 1,000 people, is far from the state's most popular attraction~~s~~. Minnesota already has 13 Indian casinos operating within its borders and the growth is still continuing. No state official is complaining about a flooding of the market. Instead, they have seen tax dollars from tourism explode, with new resort areas and non-gaming attractions being created with the profits from the casino trade.

The Red Wing sheriff told us violent and domestic crime on the reservation has actually decreased since Treasure Island opened its doors. The casino's origins began as a bingo hall, much like the one's we have now in northeast Kansas. When the 1988 Indian Gaming Regulatory Act passed, the tribe petitioned the governor to add video slot machines and black jack to their list of games. The transition went so smoothly people in Kansas didn't even know it happened until advertisements for travel packages to Minnesota casinos began appearing in our newspapers. As of January 1992, almost 6,000 people were being employed by Minnesota Indian gaming.

But we didn't stop there. With the appearance of casino opposition in Hiawatha, the Hiawatha Daily World polled 500 residences in the Hiawatha area to find out the feelings of the local community. And though you were told a large amount of opposition to casino gaming existed in our area, the poll showed almost 60 percent favored it. Further

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vestigating found that Brc County spends more on lottery tic s than any of its eighbors. Now these casino opposition groups that received help from a clandestine Nevada Resort Association have disappeared. Our economic development groups that sought other means to breath new life into our communities and county have not been aided by their so-called facts.

Northeast Kansas residents showed they support Indian gaming by re-electing Rep. Galen Weiland of Bendena. Weiland has stood behind Indian gaming since it was first proposed and in November he was voted back to the House by a greater margin then he first was in 1990. A clear show of support considering Weiland was a Democrat campaigning in a region known for its Republican majority.

Since Treasure Island, others in our group have traveled, at our own expense, to Indian casinos in Redwood Falls and Shakopee, Minnesota. Each time we found more information backing up our initial assessments. Jackpot Junction in Redwood Falls employs almost 2,000 people and is known in the community for its large contributions to charity organizations. New hotels are being built there and businesses are flocking in.

This is no illusion. The same thing has happened to Hiawatha since the Kickapoo ~~tribe~~ nation announced its intentions. Businesses that sidestepped us in the past are now calling us without ~~any~~ no other incentive except the casino. Relations between tribe and outside communities have reached new peaks in cooperation and all this occurred during a time when the future of Indian gaming in Kansas looked bleak at best. During a time when the Woodlands, which has opposed Indian gaming, was given the authority to add simulcasting. During a time when legislators who fought gambling as a moral evil turned and proposed riverboat gambling legislation. And now the mayor of Kansas City, Kansas wants a bill giving the city the only casino allowed in the state.

The greatest force against Indian gaming has been based on morality. But I want to ask you -- where is the morality behind 60 percent unemployment on the Kickapoo reservation? Where is the morality behind decreasing federal assistance given to tribes. Where is the morality behind blocking Kansas tribes from something granted them by the U.S. congress? Morality has been used to obscure the real catalyst in Indian gaming opposition, and that is non-Indian gaming interests. Kansas tribes don't want to take the state to court to win a right that is already theirs. Why? Because they are not sitting on a mountain of gold that they can throw away whenever they feel like it. The funds they expend on court battles mean less money for tribal social service programs.

And telling them to remain quiet on their reservations is not an acceptable answer. That is like telling a person they have the right to vote but because we don't like it they'll have to fight us in court to do it. These tribes were forced to live in our state after our nation's government took everything else away from them. Our government made them dependant on those monthly assistance checks and now our government is cutting back on those too. What other choice do they have?

We face similar problems in northeast Kansas. Our fight here is for a place where our children don't have to move away in order to make a decent living. A place where minimum wage jobs are not the norm. We have seen the good that Indian gaming can bring with it and we are willing to accept the ~~bad~~ downside, just as we would accept the downfalls that any business

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brings with it.

I'm not going to rail against you saying the race issue is behind this. What is behind this is a problem rural Kansas has faced from the beginning. We don't have lobbiests here fighting on our behalf, nor do we have the votes and power in the House to push through any legislation. What we have is our voice. We didn't come here last year because we believed there was nothing wrong with Indian gaming and thought you would see the situation as we have. I guess we were wrong. But now we do know and these people have accompanied me here today to let you know we won't be quiet this time.

It's not as easy as leaving here today and continuing on down the same road. Northeast Kansas, those counties that don't have a Topeka or Kansas City, has been a victim of decreasing population and job opportunities. Our friends -- the Indian nation -- are willing to help us make some changes for the better.

We're not only fighting for a few poker chips or flashy slot machine, we're fighting for the survival of our community.

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TESTIMONY GIVEN TO THE KANSAS STATE LEGISLATURE FEDERAL AND STATE LEGISLATIVE COMMITTEE ON JANUARY 12, 1993 IN TOPEKA, KANSAS

MR CHAIRMAN, COMMITTEE MEMBERS, MEDIA REPRESENTATIVES, INTERESTED PARTIES,

I COME BEFORE YOU TODAY TO TELL YOU OF OUR SUPPORT OF THE INDIAN NATIONS EFFORT TO ESTABLISH CASINO STYLE GAMING ON THEIR RESERVATIONS AND OUR SUPPORT OF THE LEGISLATURE ENACTING A QUICK MEANS TO HELP THE INDIAN NATIONS REACH THAT GOAL.

JUST OVER ONE YEAR AGO, THE KICKAPOO NATION CAME TO US TO ASK FOR OUR HELP IN LOCATING A SPOT FOR THEIR CASINO. WE FOUND A LOCATION THAT IS COVERED BY THE 1854 TREATY BETWEEN THE KICKAPOO NATION AND THE UNITED STATES OF AMERICA. SINCE THAT TIME WE HAVE BECOME FRIENDS AND HAVE COOPERATED IN MANY WAYS. WE HAVE COME TO REALIZE THAT OUR ECONOMIC DESTINY IS LINKED TO THEIRS.

NORTHEAST KANSAS IS MOSTLY AGRARIAN AND IF WE ARE TO SURVIVE, WE NEED TO DIVERSIFY OUR ECONOMY. WE FEEL THAT THE INDIAN CASINOS AND THE RELATED INDUSTRIES THAT WILL DEVELOP, WILL HELP US ACHIEVE THAT DIVERSITY.

THE FEDERAL GOVERNMENT HAS TRIED TO HELP THE INDIAN NATIONS BY GIVING THEM AID. THIS EFFORT HAS NOT WORKED. YOU CAN NOT GIVE SOMEONE SELF RESPECT. SELF RESPECT HAS TO BE EARNED. THERE IS AN OLD SAYING THAT SAYS "GIVE A MAN A FISH AND YOU WILL FEED HIM FOR ONE DAY. TEACH THAT MAN TO FISH AND YOU WILL FEED HIM FOR A LIFETIME". THE CONGRESS OF THE UNITED STATES HAS ATTEMPTED TO "TEACH THE INDIANS TO FISH" THROUGH THE INDIAN GAMING REGULATORY ACT. THROUGH THIS ACT, THE INDIAN NATIONS CAN EARN THEIR OWN MONEY AND ALSO THEIR SELF RESPECT, THROUGH NO COST TO THE TAXPAYER. HOW MANY PROGRAMS HAVE SO MUCH TO OFFER AND YET COST THE TAXPAYERS NOTHING?

YOU HAVE BEEN TOLD THAT THE CASINO ISSUE IS ONE OF UNFAIR COMPETITION, BY THE RACE TRACKS. IT IS NOT. PEOPLE WANTING TO ATTEND THE RACES WILL STILL ATTEND THE RACES, THE CASINOS WILL JUST OFFER AN ALTERNATIVE FORM OF ENTERTAINMENT. BUSSES LEAVE KANSAS EVERYDAY HEADED FOR INDIAN CASINOS LOCATED IN MINNESOTA, IOWA, AND SOUTH DAKOTA.

YOU HAVE BEEN TOLD THAT THE CASINO ISSUE IS AN INDIAN ISSUE. IT IS NOT. TWENTY-FIVE COMMUNITY LEADERS INCLUDING MAYORS, COUNTY COMMISSIONERS, AND OTHERS IN NORTHEAST KANSAS SIGNED A JOINT RESOLUTION SUPPORTING INDIAN GAMING. MANY NON-INDIAN PEOPLE WILL BE EMPLOYED BY THE CASINOS AND RELATED INDUSTRIES. THE SUPPORTERS OF INDIAN GAMING ARE PREDOMINANTLY NON-INDIAN PEOPLE. (LOOK AROUND THE ROOM AT THE GROUP ASSEMBLED HERE TODAY.)

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YOU HAVE BEEN TOLD THAT THE CASINO ISSUE IS A TAX ISSUE. IT IS NOT. WHILE THE CASINO ITSELF WILL NOT PAY ANY TAXES, THE NON-INDIAN CORPORATIONS MANAGING THE CASINOS WILL PAY INCOME TAXES. ALSO THE NON-INDIAN PEOPLE WORKING IN THE CASINOS WILL PAY INCOME TAXES. ALSO, THE WINNINGS WILL BE TAXED BY THE STATE OF KANSAS.

YOU HAVE BEEN TOLD THAT THE CASINO ISSUE IS A MORAL ISSUE. IT IS NOT. WHILE SOME PEOPLE CONSIDER GAMBLING IMMORAL, I SUBMIT TO YOU THAT POVERTY AND THE INABILITY TO FEED YOUR FAMILY IS A FAR GREATER EVIL. IF SOMEONE DOESN'T WANT TO GAMBLE, THEY CAN AVOID THE CASINOS. BUT THE RESERVATIONS AND THE NON-INDIAN PEOPLE OF NORTHEAST KANSAS NEED AN ANSWER TO THEIR UNEMPLOYMENT PROBLEM NOW. NONE OF THE EVIL THINGS THAT HAVE BEEN IMAGINED BY SOME OPPONENTS, WITH THEIR OVER ACTIVE IMAGINATIONS, HAVE COME TO PASS IN AREAS WHERE INDIAN CASINOS HAVE BEEN BUILT. LET'S LOOK AT WHAT HAS ACTUALLY HAPPENED AND NOT WHAT SOMEONE THINKS MAY HAPPEN.

I HAVE VISITED THE INDIAN OWNED CASINOS IN MINNESOTA AND I WOULD LIKE TO TELL YOU WHAT I FOUND THERE. THE CASINOS ARE WELL BUILT AND MANY HAVE INDIAN MOTIFS. THEY ARE WELL RUN, AND ALL OF THE CASINOS THAT I TOURED ARE OPERATING AT A PROFIT. THEY ARE ONE OF THE AREA'S LARGEST EMPLOYERS AND THE MAJORITY OF THE EMPLOYEES ARE NON-INDIAN PEOPLE. NOT BECAUSE THE INDIAN PEOPLE DON'T WANT TO WORK THERE, BUT BECAUSE THE NUMBER OF EMPLOYEES REQUIRED FOR THE CASINO OPERATION, EXCEED THE NUMBER OF INDIANS AVAILABLE.

AT SHAKOPPEE, MINNESOTA THE MYSTIC LAKE CASINO JUST RECENTLY OPENED. THE PROFITS FROM THIS CASINO AND FROM THEIR SMALLER CASINO, HAVE BEEN USED TO EDUCATE THE INDIAN CHILDREN. ANY INDIAN CHILD CAN ATTEND ANY COLLEGE OF THEIR CHOICE ANYWHERE IN THE WORLD. SOME OF THE PROFITS HAVE BEEN USED TO BUILD HOUSING ON AND OFF OF THE RESERVATION. ALSO, THE ADULTS HAVE BEEN ENCOURAGED TO GET TECHNICAL TRAINING AND IF NECESSARY SUBSTANCE ABUSE COUNSELING SO THAT WHEN THE GAMING BONANZA WANES, THE INDIAN PEOPLE WILL BE IN A BETTER POSITION TO ECONOMICALLY COMPETE. THE MORAL OF THE STORY IS THAT THE MONEY IS BEING USED TO BETTER THE INDIAN NATIONS AND IS NOT BEING SQUANDERED OR SKIMMED BY THE TRIBAL COUNCILS.

THE INDIAN NATIONS ARE ALSO COOPERATING WITH THE LOCAL CITIES AND COUNTY GOVERNMENT. THEY HAVE JOINTLY BUILT ROADS AND THE INDIAN NATION IS PAYING THE SALARY OF AT LEAST ONE OF THE CITY'S POLICE OFFICERS. WHEN THE CITY GOVERNMENT AND THE INDIAN NATIONS TRIBAL COUNCIL RESPECT ONE ANOTHER, MANY THINGS CAN BE ACCOMPLISHED.

THANK YOU FOR YOUR ATTENTION, AND I HOPE THAT WE CAN BRING THIS ISSUE TO A SWIFT CONCLUSION.

James Theron Mayo F&SA 1-12-93

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SUNFLOWER
RACING, INC.

Testimony

before the
House of Federal and State Affairs
Presented by Denny Burgess
Representing Sunflower Raceing
Owners of Woodlands Race Track
January, 12, 1993

Chairman Graeber and members of the Federal & State Affairs Committee:

I'm Denny Burgess, representing Sunflower Racing, owners of the Woodlands Race Track in Kansas City, Kansas. I would commend you for a "record" rapid start to the Legislative session. This is the first time I can remember in the 22 years I've been around here that hearings were held on the 2nd day of the session.

Since we just received HB 2023 today, we have not had time to have our legal experts go over it, nor was it possible in this short time span to bring in experts from out of state to testify, but we would like to be on record supporting your efforts to develop an orderly process for carrying out the role that the Kansas Supreme Court has confirmed that the Legislature must play in approving gaming compacts.

A quick review of HB 2023 leads me to believe that it is a good place to start and we would urge you to proceed with developing a process that is fair to both the Indian Nations and existing gaming interests in the State.

Thank you for your time and interest.

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SAC & FOX TRIBE OF MISSOURI

Reserve, Kansas 66434 (913) 742-7471

FAX MEMO
PAGES 3 DATE 1-12-93 FAX # 296-3834
TO Mary Galligan
FROM Sandra Kee
CO. Sac & Fox Nation of Missouri
PH # (913) 742-7471 FAX # 913-742-3785

January 12, 1993

Ms. Mary Galligan
Legislative Research Dept.
State Capitol
Topeka, Kansas

Re: Sac and Fox Nation Response to Proposed Gaming Compact Legislation

Dear Ms. Galligan:

Due to the inclement weather I will be unable to appear and testify before the committee which is taking testimony on the proposed compact negotiating legislation.

Please allow this letter serve as the official response of the Sac and Fox Nation of Missouri in Kansas and Nebraska to the proposed legislation to be placed in the record of the committee hearing.

Overall I believe the proposed legislation presents a fair and comprehensive negotiating process which, on its face, does not appear to be unduly burdensome. My comments and concerns on specific sections of the proposed bill are as follows:

New Section 2. (a). This section allows the joint committee to approve, recommend modification or to reject a compact negotiated by the Governor's office. I question whether or not there is really any significant difference between a rejection and a recommendation for modification. Assuming that a compact will at some point meet with the committee's approval, the rejection language may be wrongly construed as a license to reject a compact out of hand.

The intent of the language seems to suggest that, in reality, the committee would not reject a compact but would rather have the right to only reject certain sections of a compact. Recommendations for remedial or alternative language would be forthcoming from the committee to the Governor's negotiator and a subsequent compact would be resubmitted to the committee. This process may take more than one attempt to get an acceptable compact but it would not go on ad finitum.

If my interpretation is correct then I would think the "rejection" language could be omitted to help eliminate ambiguities.

New Section 2. (b). This section permits the Speaker of the House

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and the President of the Senate to negotiate a compact if the Governor fails to do so.

Given that the Indian Gaming Regulatory Act (the "IGRA") provides for only a 180 day compacting process, we would suggest that deadlines be established for each stage of the process. I think this is particularly important given that the time period for negotiation and approval could extend past the time the legislative session adjourns.

A rather simplistic suggestion would be to provide that the negotiating period with the Governor's office would not exceed 60 days. The review by the Joint Committee would not exceed an additional 60 days. If the committee requested modifications, the negotiations with the Governor's office could not exceed an additional 30 days. The Joint Committee would then have an additional 30 days to re-review the compact.

If at the end of the statutory 180 negotiating period a compact is not approved, the parties should follow the guidelines of the IGRA and submit the last two proposals to the Federal Court in a non-adversarial proceeding for a final determination.

New Section 2. (d)(1)&(2). This section requires additional negotiations of compacts and could end up being extremely problematical unless the topics subject to renegotiation are specified. Since the IGRA prohibits the taxing of an Indian gaming operation, I question what, other than additional games or the number of tables or machines allowed, would be the subject of renegotiation.

Financing of the type of mega-resort/theme park which the Sac and Fox envision may become more difficult if the rules of operation may be subject to later restriction. Some clarifying language in this section could prevent later ambiguities or conflicts.

New Section 3. (b)(1). This section provides that the committee will transmit to the Governor guidelines reflecting the public policies and state interests that gaming compacts must address.

I respectfully submit that this process may open the door to some potential abuse of the negotiating process and potential bad faith. I also want to point out that the Sac and Fox Nation has not heretofore alleged any bad faith on the part of the State and has not filed suit. That fact is brought to your attention so that my comments on this point will not be seen as a red flag but rather as an honest and legitimate concern.

The committee has the potential of "gutting" a compact before the negotiating even begins if it sets forth such restrictive policies as to doom the process before it begins. We equate this to making a gift of a new car but which has an empty gas tank and to which

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there are no keys. Again, there is no attempt on my part to throw a wrench in the works; I only wish to express my concern so the committee will be diligent and thoughtful in performing its proposed duties.

We are very proud of the fact that the compact we submitted and signed by Governor Finney has restrictions and controls far beyond what an uninformed person would suspect. The internal controls and guidelines established for our facility, along with the regulatory and oversight cooperation provisions between the State of Kansas and the Tribal Gaming Commission, are truly second to none and go far beyond the statutory requirements of either the IGRA or the stringent gaming statutes of states where gaming has already been regulated.

Inasmuch as the remainder of the draft of the bill deals with definitions and internal state agencies I will limit my comments to the foregoing.

As you know the Sac and Fox Nation has a compact signed by the Governor. That compact has been reviewed by the Department of Interior and has been returned to us for some revisions which were negotiated by my tribe and the Governor but which fall outside certain provisions of the IGRA.

I am having prepared a new compact for submission to the Governor and to the Joint Committee on Indian Gaming. I believe the committee will be pleased with the level of State-Tribal oversight and cooperation which our compact contemplates. Quite frankly, it far exceeds that called for in the proposed bill.

On behalf of the Sac and Fox Nation, I wish to express my sincere thanks for the past support of Governor Finney and the current support of the legislature. The tremendous economic opportunities for my tribe and for the entire state of Kansas are in your hands. The Sac and Fox Nation looks forward to establishing a new era of cooperation and a more enduring relationship between the Sac and Fox Nation and the great state of Kansas.

Respectfully Submitted,

Sandra Keo

Ms. Sandra Keo
Chairperson of the
Sac and Fox Nation of Missouri

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City of Horton

P.O. Box 30
HORTON, KANSAS 66439
(913) 486-2681

PUBLIC HEARING COMMENTS

HOUSE FEDERAL and STATE AFFAIRS COMMITTEE

JANUARY 12, 1993

CHAIRMAN GREABAR and MEMBERS of the COMMITTEE:

I am Ted Hauser, City Administrator of Horton.

Horton is very interested in the casino project because we feel it can be a catalyst to growth in the community. My statement will deal with two aspects of the casino issue being considered today - one deals with Economics and the other with Governmental Relationships.

ECONOMICS:

Horton City's population in 1940 was 2,872. By 1990, Horton had lost 1,000 people and the population was 1,885.

Horton's economy suffered further in 1991 with the closing of the Student Loan Processing Center, which cost our community 300 jobs.

The City's assessed value went from $3,000,000 in 1990 to $2,541,039 in 1992. To maintain services, we had to increase tax rates for an economically stagnant community.

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Retail sales went from an estimated $15,900,000 in 1990 to $13,900,000 in 1992.

The Horton Community Hospital, which has been around for 80 years, is downsizing from a 30-bed operation to a 6-bed facility.

The above figures show that a boost to our economy is needed.

We feel that the casino project will bring much needed jobs in our community spurring private investment. This has occurred in other communities.

GOVERNMENTAL RELATIONSHIPS:

As I understand the Supreme Court decision, the State of Kansas has until February 12, 1993, to ratify the previously completed Gaming Compact. This does not really give much time to reinvent the wheel and we urge passage of the short version of the bill mentioned in earlier testimony. The Gaming Compact, as agreed to by the Governor and Indian Nations, is adequate and needs to be ratified. However, if a compromise is needed, then the legislature needs to negogiate now to avoid any unnecessary complications between the State and Indian Nations.

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