

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 13, 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: David Schneider, President, Kansans for Life at Its Best
Frances Wood, Woman's Christian Temperance Union
Bob Frey, Attorney, Wichita, Ks
Robert F. Stephen, Attorney General
Robert B. Davenport, Director

Others attending: See attached list

The Chairperson opened the hearings on HB 2023 in regard to the proposed legislation that has been brought to this Committee by the LCC in regard to Indian gambling procedures.

Dave Schneider, President, Kansans for Life At Its Best, stated that although listed as an "opponent", relative to the positions taken on this bill January 12, by the "proponents", our view on this proposed legislation is generally favorable. It is requested that New Section 2. be changed so that any compact approved by the Committee must be submitted to the full legislature for final approval. (See Attachment #1).

Frances Wood, 4724 S.E. 37th Street, Topeka, Kansas, testified in opposition of HB 2023 and stated that the complete legislature should vote on the negotiations with the Indian tribes. (See Attachment #2).

Bob Frey, Attorney, Wichita, Kansas, testified in opposition of HB 2023, stating it is apparent that unrestricted casino gambling which may be allowed on Indian reservations can produce substantial pressure to allow that kind of casino operation in facilities off the reservation. (See Attachment #3).

As a member asked, do you know any states that have, through the state legislature, set out guidelines of a plan?

Mr. Frey answered, the state of Washington.

A member asked if there was any conflict with IGRA, particularly on reservations?

Mr. Frey replied, no.

A member stated that on and off reservations are two different things. Tribal nation reservations are not the state of Kansas.

Mr. Frey stated, I believe it is all dependent upon the legislature and how bold they want to be.

Robert Davenport, Director, Kansas Bureau of Investigation, stated the KBI's position on Indian gambling is strictly neutral. We are neither for or against the issue. Whatever the Governor, the legislature, and the people of Kansas decide, the KBI will uphold the laws and mandates we are given. There are some issues

they feel should be brought before the committee's attention. The KBI's closest experience to casino gambling is the racing industry in which we were given certain statutory responsibilities in 1987. (See Attachment #4).

Mr. Davenport further stated, a great deal of what KBI brings today is brought from our racing enforcement experience along with other states experiences. After reviewing HB 2023, the KBI feels some areas need additional consideration. Specifically Section 4. (c) requires fingerprinting of certain persons in gaming operations. The KBI believes all persons employed by the casinos should be licensed and fingerprinted. Fingerprints are necessary for criminal record checks and completed background checks. Licensing insures that some level of background investigation has been completed and any criminal history uncovered.

Secondly, Section 4. (d) provides that the Director of Indian gaming may receive from KBI or other criminal justice agencies, such criminal history record information (including arrest and nonconviction data.) Non-criminal justice agencies receive conviction data and arrest information within the last year. In order to obtain complete criminal history information, a specific provision should be the statute requiring KBI to provide this information.

Section 5 states the KBI shall monitor Class III gaming conducted pursuant to any gaming compact to insure compliance with the provisions of the compact. It is felt "monitor" needs to be clearly defined as to the KBI role. The KBI is an investigating agency and encourage language for the KBI to investigate all administrative and criminal violations within the casinos, but also language which allows for other law enforcement. For example, the KBI would investigate serious crimes but should not be expected to provide police service for such crimes as disorderly conduct or assault. These crimes should be handled by on-site police agencies.

Regarding background investigations, the bill contains no language which specifies what persons will be subject to background investigation, who shall complete the background investigation or how the background will be used to deny employment. Backgrounds of financiers, suppliers, management companies, vendors, etc., are recommended.

Another concern is protecting the confidentiality of background reports. We would request language similar to that of last year's. KBI's policy with the Kansas Racing Commission is to present background reports orally. KBI maintains possession of these reports. Some guidelines should be set on how these backgrounds will be disseminated and utilized by the gaming director. Finally, the impact of casino gambling on the KBI would be substantial in terms of manpower costs. Of course, that would depend on the size and number of casinos. The KBI currently has 7 special agents and 1 supervisor assigned to the unit handling racing investigations. The annual budget is approximately \$400,000. It is anticipated the same number of gaming agents would be needed to provide enforcement in the state.

The Chairman asked if other states require the fingerprinting and background checks of all employees?

Mr. Davenport replied that some states do, but not all.

The Chairman asked of the Director -- you stated there is a real problem with "monitoring", have you prepared any alternate language for that?

The Director replied that he had not prepared any alternate language.

The Chairman then requested the Director to submit to the committee that alternate language dealing with "monitor".

Mary Torrence, Revisor of Statutes Office, gave a review of the Indian Compact Law.

The Chairman asked, doesn't IGRA require that some settlement of resolve be made within 180 days of the agreement with the compact?

Staff replied, it requires good faith negotiations to begin within 180 days of the request by the Tribe.

A member stated this is like a 2-step process. The Governor and/or her designee negotiate the compact with no legislative involvement, then that compact comes to the Committee which sort of does it again. They hold full public hearings, go through it and hold hearings. Is this similar to Oklahoma?

Staff stated that Oklahoma statutes provide for the legislative committee to sign off on compacts.

A member asked if another variation of this, which other states passed have some kind of a joint negotiations team, which includes the Governor, and legislators and they essentially do this once, not twice?

Staff stated the state of Minnesota has used a joint negotiating team, not set out in the statutes that way. The Minnesota Governor has included 2 members of the legislature on their team.

A member asked, to meet the requirements set out by the Kansas Supreme Court in the Finney case, that having legislative involvement at the negotiating level would satisfy that or how much legislative involvement do we need? Could you put together one process with legislative members and administration and meet the Supreme Court's requirement of legislative involvement?

Staff stated, they believe you could. Under the Finney case and maybe because this wasn't an issue, it wasn't addressed, but in the Finney case, the Court said the compacts that the Governor has negotiated requires statutory amendments or additional legislation and the Governor can't do that. The Courts did not say the Legislature has the authority to enter into the compact. The legislature is going to have to set up the statutory frame-work and that includes rules of the compact.

The Chairman asked, does the law require that the Governor be the one to negotiate the compact? Could it not be a legislative committee that actually negotiates and finalized the compact without the Governor at all?

Staff stated, they believe it could be that way.

A member asked if it were possible to get a copy of the compact?

Staff stated, yes, it is lengthy. If any of you want a copy, please let staff know and copies will be made.

The Chairman asked staff to please make a copy of a compact available to members of the committee to see and review.

The next conferee was Attorney General Robert T. Stephan, giving background on HB 2023. (See Attachment #5)

Discussion

The Attorney General stated he had just argued a case in the Supreme Court of the U. S. on Monday as to whether or not the state of Kansas has criminal jurisdiction on Indian Reservations and hopefully that case will be decided in the next 60-90 days. We believe the Court will hold the state does have jurisdiction and thinks it should be included in the negotiation process.

The Chairman asked if the Attorney General could expand on a question that some of the new members of the committee have concerning how the authority came about that will allow Indian casino gambling in the state of Kansas under IGRA.

The Attorney General stated that when the people of this state passed the Lottery Constitution Amendment, they set into motion the right for the Tribe to have casino gambling on the reservations. The Lottery Amendment establishes Class III gambling as per the Indian Regulatory Act. Since Kansas has Class III gaming, the various tribes are entitled to have that same ability. There is some dispute if lottery also means casino gambling. In 1987 you received an opinion that lottery means casino gambling. In Stephan's opinion there is no doubt. There has not been a Supreme Court case on the issue but certainly that is the way the Secretary of Interior interpreted Title III gaming. Stephen said also the state could own and operate a casino, it would require a change in statute.

Mr. Stephan stated, I believe the Indian Gaming Regulatory Act allows the state to protect itself, from outside interest that may be involved with activities if not checked would be detrimental to the state. The tribe may run and operate a casino but within reasonable limits. The state can establish those limits. As a matter of fact, there was an article published in the Washington Post about a study by the Department of Interior that said millions of dollars had been taken from Indian tribes in this country by operators of casinos because there was not sufficient oversight. The article said both the federal and the state government had not provided an adequate mechanism to make sure that didn't happen.

A member asked, is it correct to assume that the federal government did not want to preempt state authority to exercise negotiating efforts as it relates to Class III gaming.

The Attorney General stated it is recognition of state concerns. Out of the Cozagan Case in California, the Court ruled the state had no authority in regard to casino gambling on Indian reservations and from that case was the result of the various concerns. Congress passed the Indian Gaming Regulatory Act in hope that there could be good faith negotiations for compacts.

Mr. Stephan said the bottom line is, the negotiation process needs to set a day by which you target completion of a compact and certainly the tribes have rights reserved for them, but the states also have rights and hopefully there will be a meeting of the minds. If there isn't then the Courts are going to tell the state and tell the tribes when completion must occur.

Mr. Stephen further stated, I believe the Supreme Court v Finney sets out some very important guidelines as what must be done in good faith in negotiations. The ballgame has been over for a long time and we need (the legislature) needs to move on it because our state needs to be protected also and the state needs to make the decision rather than the Court.

A member asked, can we prohibit casinos in downtown Topeka on private land? The state should be receiving funds out of this if we are going to allow it.

Mr. Stephan replied, under the constitution only the state could operate a casino. The state can do that anywhere within the boundaries of our state outside the reservation, but not a local entity, only the state.

A member asked, if a commission is set up like the Racing Commission and they come and say we want to put a casino in, they could just do that?

Mr. Stephan stated, there would have to be appropriate legislation to set up the mechanism. Under the Constitution and the Lottery Amendment, you would have a right to do that. It is not automatic; it would take legislation to bring that about.

A member questioned, what about the ability of a group to purchase land in downtown Wichita and deed it over to a tribe?

Mr. Stephan stated, they could deed land in trust to the Secretary of Interior, but it would not fall under the Indian Gaming Act by just deeding the land, it takes certain steps. The land in Minnesota was deeded to the Secretary of Interior in trust for a particular tribe and approved for casino gambling.

The Chairman stated, your letter states there is going to be a status conference on February 12. Do you think the fact that this legislation is being considered at this time will get you past this date?

Mr. Stephen replied, I think the action you are taking will show the Court you are doing everything possible to negotiate the compact and act in good faith and there is reason for the Court to believe the compact will be fully negotiated by the end of this session.

The state has no obligation to enter negotiations with a tribe that does not have a reservation in our state or a tribe that does not have trust land deeded to the Secretary of Interior and found to be amenable to casino gambling. The Governor of the state can either say yea or nay to trust property. That is the one place in the Indian Gaming Regulatory Act where the Governor has virtually sole authority.

It was the opinion these tribes have an absolute right to casino gambling and the state should move forward. There was a way perhaps last year to have initiated a constitutional amendment banning casino gambling, but that was not done. The Attorney General said he did not want to commit himself on the legal issue but frankly it would be bad at this late date for the legislature to try to change the rules of the game. We have been playing around with this since 1987. These tribes have rights also. I think it is a little late to change.

The committee adjourned at 3:20 PM and the next meeting will be Wednesday, January 20, 1993.

Date: 1/13/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Dave Schneider	KANSANS FOR LIFE AT ITS BEST	Topeka, KS.
Brian Nauheim	Pat Hubbell Assoc.	Topeka, Ks
Frances Wood	womans Christian Temperance Union	Topeka, Ka.
Russ M. B. 12th	observer	Topeka
Dwight Miller	A.G.	Topeka
Noel A. Woorman	A.G.	Topeka
Charles V. Hamm	Self	Topeka Kan
Luther W. H. W. 12th	Potawatomi	Mayetta, Mo.
FRED THOMAS	KICKAPOO Council	Kick. Res.
Mary Ellen Conlee	Potawatomi Indian Tribe	Wichita KS.
ALAN COBB	POTAWATOMI INDIANS	Wichita
John Parks	K D OR	Topeka
Ara Gragg	KDOR	Topeka
Brent Moore	CCB	Topeka
Patti Weiland	Self	Hiawatha

Date: 1/13/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Michelle D Dawson	self	Olatche KS
Harold D Dawson	Self	Olatche, Ks.
Gary Weiland	City Tot. Hiawatha	Hiawatha, Ks
Robert Sherburne	Topeka	Topeka Ks
David Frankel	SELF	Topeka
Barry A Stokes	Hiawatha Foundation for Economic Development	Hiawatha Ks.
Carole Barr	attorney General for the Kickapoo Nation	Lawrence, Ks.
John Means	Hiawatha Foundation for Economic Development	Hiawatha
Deborah L. Sutton	Kansas Lottery	Topeka, KS
Ralph Decker	Kansas Lottery	Topeka, KS.
Carl Anderson	Kansas Lottery	Topeka
Jim Henderson	Kansas Lottery	Topeka
Serraine Jensen	self	Topeka
Jim Conant	Ks. ABC	Topeka
Robert Engler	Ks ABC	Topeka

Date: 1/13/93

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Charles Kohler	KRC	TOPEKA
Tom Burgess	Sunflower	Topeka
JEFF SONNICH	HNCSI	TOPEKA
Nancy Bears	Treasurer - Kickapoo Tribe in Kansas	PO Box 271 Hartm, KS 66439
Roger Truitt	KS Gov't Consulting	Topeka
Steven Waljo		Lawrence
Denny Burgess	Sunflower Racing	Topeka
Rob McKnight	The Ceres Group	Overland Park
Sue A. Leebetter	N.O.W.	Lawrence
Betty Armstrong	KS Choice Alliance	Overland Park
Margaret Johnson	KCKs	KCKs
Marc Wilson		Hiamatha
D. Switz	MAGIC	Topeka
Sheila Koslas	KS Choice Alliance	O.P. KS.
Barbara Holzmack	NCTW - KS Choice Alliance	Sharoness Mass H. K. O.

Date: 1/13/93

FEDERAL and STATE AFFAIRS COMMITTEE

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1/13/93

TESTIMONY BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE ON
H.B. 2023

Mr. Chairman, Members of the Committee,

My name is Dave Schneider and I recently assumed the role of
President of Kansans For Life At Its Best.

I'd like to begin my testimony by addressing our position on this
bill and then make some general remarks in response to some things
that were said yesterday.

HOW WE VIEW THE BILL

Although we are listed as an "opponent", relative to the positions
taken on this bill yesterday by the "proponents", our view on this
proposed legislation is generally favorable. We understand the
legal constraints that are present and appreciate the effort of the
legislature to address those in a way that protects the interests
of Kansans.

We do suggest some change. In light of the important nature of this
matter and the widespread impact it could have on the lives of
citizens in this state, we ask that New Sec. 2. be changed so that
any compact approved by the committee must be submitted to the full
legislature for final approval. We think it essential that every
citizen be represented on this matter through their own elected
officials.

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Might I also add our support for Mr. Frey's suggestion that New Sec. 3. be amended so that in (b)(1), the "guidelines reflecting the public policies and state interests that gaming compacts must address" be decided upon beforehand by the legislature and made part of the statutory language in this bill.

THE LEGAL HAZE

It seems from yesterday's testimony that a legal haze still surrounds these issues and it may be within the realm of possibility for the legislature to exercise its prerogative in setting public policy to prohibit casino gambling on Indian lands. If this is indeed the case, we would urge the committee to pursue that path.

INDIAN ECONOMIC DEVELOPMENT

Finally, I'd like to make a few remarks concerning Indian economic development. Yesterday we heard from various conferees the following:

*Casinos present the only prospect for Indian economic development.

*Indian gaming may be only a five year open window.

*Casinos are only a beginning, there has to be diversification.

*Congress is looking at enterprise zones to help Indian economic development.

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Now, if you step back and look at these as a whole, the view on Indian gaming looks a little different. It appears that casinos may not be the answer for long term economic development. In the short period of a decade they may have gone bust and we'll be right back at square one. It also appears that not every option has been tried. Innovative solutions such as federally created enterprise zones offer new avenues of development that depart from old paths.

Casinos are not a long-term solution to the economic problems facing the Indian nations. Casinos do not create wealth. They simply serve as a way to redistribute it. As Peter Drucker explains in his book, Managing For The Future, wealth is created by "knowledge applied to human work". There is no other way to create it. The casinos will not contribute to the knowledge base necessary for the Indian nations to create a healthy, growing economy. In fact, the ethos promulgated by casinos, that wealth can be had through chance, will effectively block the development of the mindset necessary to fostering the creation of wealth.

Casinos therefore are a dead end. We know from experience that no group can thrive economically in the long run as the recipient of redistributed wealth. The key is to learn how to create wealth.

The Indian nations are at a crossroads. In one direction lies the wide open, easy path offering quick riches. In the other direction is a narrow path that offers a slow and sometimes painful process of learning how to create wealth. If the Indian nations follow this

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narrow path, their children and grandchildren will rise up and call them blessed. If, on the other hand, they go down the path offering quick riches, a generation from now they will be back at this same crossroads and the only path left will be the narrow one. I urge them to choose wisely.

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Mr. Chairman Graeber,
Members of the House Federal and State Affairs Committee:

My name is Frances Wood, 4724 S. E. 37th St., Topeka, KS 66605, I am a volunteer for the Woman's Christian Temperance Union and a concerned citizen.

I am speaking in opposition to HB ²⁰²³2002.

I concur with Dave Schneider of Kansans For Life At Its Best that the complete legislature should vote on the negotiations with the Indian tribes.

It is a concern of mine that we are having to feel like casino gambling is a "given". I never once heard the words "Casino gambling" mentioned when the promoters of lottery were proposing that in 1986. It is somewhat of a trick that we are forced to consider this issue.

It is my understanding that the lottery ^{is} was to sunset in 1996. If that is the case, where do we stand on Indian casinos? After big buildings have been constructed, many people hired, how hard is it then to get the steam roller stopped.

Has any consideration been given to the treatment of gambling addiction that is sure to follow? Will the Indian tribes be assessed a certain amount to help cover those expenses?

If at this date, there is any way to avoid all the problems associated with casino gambling, I would appreciate your looking at that measure.

Thank you.

Fr SA
1-13-93

Alan

TESTIMONY BEFORE
the
HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS
regarding
HOUSE BILL 2023
by Robert G. Frey,
Wichita, Kansas

Ladies and Gentlemen of the committee it is a pleasure to appear before you regarding House Bill 2023 which deals with the mechanism of review of compacts between the State of Kansas and various Indian tribes in Kansas who wish to establish a casino gambling operation within the state.

For the purpose of background, let me state that I am a citizen of the City of Wichita and have been working with a group of people in that city known as Stand Up For Wichita. The purpose of the group is to resist the development of a gambling casino in the downtown Wichita area.

As we have become more knowledgeable about the Indian Gaming Regulatory Act of 1988 we have come to the conclusion that the Act imposes two very different standards for **on reservation** and **off reservation** gaming but the impact that the two concepts have upon each other is significant. In other words, it is apparent to us that unrestricted casino gambling which may be allowed on Indian reservations can produce substantial pressure to also allow that kind of casino operation in facilities off of the reservation. It is, therefore, important that guidelines be established which are strict in nature and which limit the type of

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gambling that will be allowed. We have labeled the two main types of gambling as social gambling and commercial gambling. Commercial gambling can loosely be described as gambling by professionals for high stakes.

New Section 3 of H.B. 2023 provides for the establishment of a joint committee on gaming compacts and gives that committee extraordinary powers. Subsection (b)(1) provides that the committee shall "Establish and transmit to the Governor guidelines reflecting the public policies and state interests that gaming compacts must address".

It is my belief that the heart of this matter lies in what is established as the guidelines reflecting the public policies and state interests that compacts must address. If there is any hope for uniformity in this area it is my belief that the full legislature should establish the guidelines reflecting public policies and state interests and not a special committee made up of ten members of the legislature.

The uniform guidelines should be adopted by the legislature and become the law of this state which can be enforced as all other laws. If the standards for operation of casinos on Indian reservations are not established by statute, there will always be a temptation for the Joint Committee on Gaming Compacts to vary from their standards and possibly tighten or loosen the standards depending upon the circumstances in individual cases.

The Joint Committee will be made up of ten members with a quorum of only six needed to act. In some cases it would be possible for 4 members to legally establish the guidelines, public policies and state interests which must be addressed in any compact. It is my belief that this is in direct contravention of the law which the Supreme Court stated in State ex rel. Stephan v. Finney concerning the approval of the casino gaming compact with the Kickapoo Nation. In that case, the Court clearly stated that any compact entered into between the Governor and a Kansas Indian tribe must also be approved by the legislature. The Court said:

"On the narrow issue presented, we conclude the Governor had the authority to enter into negotiations with the Kickapoo Nation, but, in the absence of an appropriate delegation of power by the Kansas Legislature or legislative approval of the compact, the Governor has no power to bind the State to the terms thereof."

I urge the committee to amend New Section 3 of H.B. 2023 to delete subsection (b)(1) and, instead, to adopt statutory guidelines reflecting the public policies and state interests that all gaming compacts must address. I further urge this committee to adopt guidelines which are narrow in their scope with the goal of limiting casino operations to social gambling as opposed to commercial gambling. In that regard I would suggest that the statutory guidelines provide such restrictions as:

- * Make gaming debts uncollectible and make any attempt to collect such a debt a crime.
- * Ban any form of credit gambling.
- * Require casinos to close for at least a few hours each day.
- * Limit the dollar amount of any bet.
- * Ban the giving of free alcoholic drinks to players.
- * Fine, suspend and ultimately revoke the license of any casino that allows juveniles to gamble.
- * Restrict the size of any casino to a certain square foot limit.

In suggesting the above guidelines I urge the committee to adopt strict limitations on casino operations which are uniformly applicable to all casinos which may ultimately be authorized under the provisions of the Indian Gaming Regulatory Act.

Thank you for the opportunity to express my views on this subject.

Robert G. Frey



ROBERT B. DAVENPORT
DIRECTOR

KANSAS BUREAU OF INVESTIGATION

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ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
ROBERT B. DAVENPORT, DIRECTOR
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE
REGARDING INDIAN GAMING
JANUARY 13, 1993

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you today to express some views of the Kansas Bureau of Investigation (KBI) regarding Indian gaming legislation. First, I want to say that the KBI's position on Indian gaming, and gaming in general, is strictly neutral. We are neither for nor against the issue. Whatever the Governor, the Legislature and the people of Kansas decide, the KBI will endeavor to uphold the laws and enforce mandates we are given. There are some issues, however, which I believe should be brought to the committee's attention.

The KBI's closest experience to casino gambling is in the racing industry in which we were given certain statutory responsibilities in 1987. So a great deal of what I share with you today is based on our racing enforcement experience, along with information from other states which currently have legalized casino gambling.

We have reviewed House Bill No. 2023 and see some areas which we feel deserve additional consideration. Specifically:

1. Section 4(c) requires the fingerprinting of certain persons in the gaming operation. We believe that all persons employed by a casino should be licensed and fingerprinted. Fingerprints are necessary for

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criminal history record checks and for positive identification in completing background checks. Licensing ensures that some level of background investigation has been completed and any criminal history is uncovered.

2. Section 4(d) provides that the Director of Indian Gaming **may** receive from the KBI or other criminal justice agencies such criminal history information including arrest and non-conviction data. Please be advised that when a criminal history record check is requested by a non-criminal justice agency, arrest and non-conviction data is **not** included. Non-criminal justice agencies receive conviction data only and arrest information if it occurred within the last year. In order to obtain complete criminal history information, a specific provision should be included in the statute requiring the KBI to provide this criminal history information.

3. Section 5 states the Kansas Bureau of Investigation shall monitor class III gaming conducted pursuant to any gaming compact. We believe that the term 'monitor' needs to be clearly defined as to the KBI's role. The KBI is an investigatory agency and we would encourage language which gives the KBI authority to investigate all criminal and administrative violations within the casinos, but also language which allows for other law enforcement presence in the casinos. For example, the KBI would investigate serious crimes, primarily felony violations, but should not be expected to provide police services for such crimes as disorderly conduct or assaults. These types of violations should be handled by an on-site police agency.

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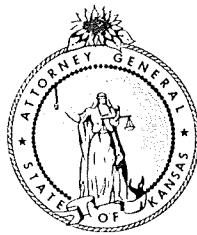
4. Regarding background investigations, this bill contains no language which specifies what persons will be subject to a background investigation, who shall complete the background investigations, or how these backgrounds will be used to deny employment. We recommend background investigations of financiers, management companies, vendors, machine suppliers, and key personnel.

Another concern is protecting the confidentiality of background reports. We would request this act contain language similar to that in last year's Senate Bill 367. KBI policy with the Kansas Racing Commission is to present background reports orally. The KBI maintains possession of these reports to ensure confidentiality. We would not be willing to provide written reports to the Director of Gaming, nor to any tribe. Some guidelines should be set on how these backgrounds will be disseminated and utilized by the Director.

Finally, the impact of casino gambling upon the KBI would be substantial in manpower costs. The extent would, of course, depend upon the number and size of casinos. We currently have seven special agents and one supervisor assigned to the unit handling racing investigations. The annual budget, reimbursed by parimutuel racing and the lottery, is approximately \$400,000. It is anticipated that a comparable number of gaming agents would be required to provide enforcement for each casino constructed within the state.

Thank you for allowing me to speak on this important legislation. I will be happy to respond to questions.

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STATE OF KANSAS

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ROBERT T. STEPHAN
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Testimony of Robert T. Stephan
Attorney General
Before the House Committee on Federal and State Affairs
Re: Negotiation of Indian Gaming Compacts
January 13, 1993

Mr. Chairman, Members of the Committee:

Thank you for inviting me to speak to you with regard to this issue. I am pleased this committee is prioritizing the need to enact legislation that will provide the mechanism necessary to review and take appropriate action on Indian gaming compacts. By now you should each have received my letter explaining the urgency of this matter; two cases are currently pending in federal district court which may be resolved against the state if we have not taken sufficient steps toward providing such a mechanism. The judge presiding in those two cases has scheduled a status conference for February 12, at which time he will assess the progress the state has made in developing a compact approval process. As noted in my letter, establishment of a process for reviewing and acting upon compacts does not represent a vote either for or against Indian gaming. It is simply a necessary

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procedural step to insure the state's ability to have a voice in the matter of Indian gaming.

In February of 1987 I issued opinion no. 87-38 which concluded that the 1986 amendments to the Kansas constitution permitting a state owned and operated lottery would allow the state to conduct any game involving the three elements of consideration, chance and prize. That same year I issued opinion no. 87-101, holding that the constitution amendments resulted in Indian tribes being able to conduct games involving the three elements of consideration, chance and prize on Indian lands. Subsequently Congress enacted the Indian gaming regulatory act requiring compacts before class III (casino) gaming could be conducted on Indian lands. However, as discussed in opinion no. 91-119, the state has no choice but to negotiate such compacts under the terms of the IGRA. This does not mean all games must be accepted by the state, but merely that they are legitimate subjects of negotiation. I attach these opinions, as well as 91-160 and 92-1, for your convenience.

While I have not had an opportunity for extensive review of the bill before you, I will briefly address some of its provisions. House bill no. 2023 establishes a committee with authority to review and either accept, reject or modify compacts negotiated by the governor. In order for any entity less than the full legislature to accept the four compacts

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that have already been negotiated by the governor, the legislature must either amend existing statutes that are in conflict with the provisions of those compacts, or develop sufficient standards and guidelines to delegate such legislative authority to the entity. Alternatively, the committee could recommend acceptance of the compacts and present them to the full legislature for ratification, thereby enacting the compacts into law. This could of course, create difficulties when the legislature is not in session. Presumably for this reason, house bill 2023 appears to take the delegation route. However, the only guideline I find is in section 2(d) requiring a provision to allow renegotiation. If it is intended that the committee be able to agree to provisions that are inconsistent with state law, I believe more is necessary to avoid a potential challenge for unlawful delegation of legislative authority. On the other hand, too many guidelines may be viewed as an attempt to dictate, rather than negotiate, the compact terms. You therefore must be very careful to avoid either extreme if you choose to delegate legislative authority to the committee, or any other entity, to execute and bind the state to compacts that are in conflict with existing state law.

If the legislature chooses to amend existing statutes to be consistent with existing compact provisions, as appears contemplated by house bill no. 2023, I offer for your

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consideration several areas which may require such attention. As pointed out by the court in State v. Finney, a new agency must be established to take on the functions listed in the compacts, or else an existing agency must be given authority to handle such functions. Additionally, the agency should be given rule and regulation authority to be able to effectively administer those functions.

Consideration must be given to the ability, both legally and economically, of the KBI to conduct background investigations and supply the results of such investigations to the appropriate entities without compromising the integrity of the investigation process and otherwise confidential information. These items have been addressed by the bill to some extent. Additionally, the law enforcement training statutes may require amendment to allow training of tribal law enforcement officials. This is just a partial list of the provisions which may require amendments; areas which I pointed out to the Kansas Supreme Court in arguing State v. Finney and which the court appeared to agree needed legislative action.

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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 25, 1987

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ATTORNEY GENERAL OPINION NO. 87- 38

The Honorable Vincent K. Snowbarger
Representative, 26th District
Capitol Building, 446-N
Topeka, Kansas 66612

Re: Constitution of the State of Kansas --
Miscellaneous -- State Owned and Operated
Lotteries

Synopsis: The constitutional provision permitting a
state owned and operated lottery would allow the
state to advance and market any game or
combination of games as long as there is
consideration, chance and a prize involved in
each game. Cited Herein: Kan. Const., Art. 5,
§3C; L. 1986, ch. 414.

*

*

*

Dear Representative Snowbarger:

As Representative for the Twenty-Sixth district, you ask
our opinion as to the definition of the word "lottery."
Specifically, you question whether the game "lotto" is
allowed by the Kansas constitutional provision, Art. 15,
§3C.

The constitutional provision as voted on and passed by the
Kansas electorate did not define or restrict the term
"lottery," nor did it define or restrict itself to any
specific games. The definitional responsibility of
defining "lottery" is therefore passed to the courts of

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this state. State v. Nelson, 210 Kan. 439, 445 (1972). In Nelson, the Court stated that "[t]he definition should achieve a consistency so that it shall not be taken to mean one thing at one time and another thing at another time." Id. at 445.

In Higgins v. Cardinal Manufacturing Co., 188 Kan. 11 (1961), the Court stated that a constitution is not to be narrowly or technically construed but its language "should be held to mean what the words imply to the common understanding of men." This position was adopted in the later case of State, ex rel., v. Highwood Services, Inc., 205 Kan. 821 (1970), when the court used resources available around the time the Kansas Constitution was adopted in 1859 to define "lottery." The Court wrote in Highwood at 825 and 826 that "in ascertaining the meaning of constitutional provisions courts should consider what appears to have been the intendment and understanding of the people at their adoption. (See, also, State v. Sessions, 84 Kan. 856, 115 Pac. 641)." Thus, in defining the term "lottery" the Court has adopted common usage definitions.

In Highwood, the Court's research included the following:

"In Abbott's Law Dictionary, published in 1879, we have found this definition of a lottery:

"'A scheme for the distribution of prizes by chance, among buyers of the chances.

"'Such schemes were formerly very common, were authorized by law, and were even set on foot, in many instances, by the authorities, for raising revenue for public or benevolent purposes. [In view of the ill effects of the element of gambling involved, they are now very generally made unlawful.'

"Foremost among the citations appended to the text, the author has placed the following:

"'A lottery is a distribution of prizes by chance or lot, where a valuable consideration is given for the chance of drawing a prize. United States v. Olney, 1 Abb. U.S. 275.,' (1868).

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"Webster's Third New International Dictionary, unabridged, (1964) conveys much the same idea as it defines lottery:

"'a scheme for the distribution of prizes by lot or chance; esp.: a scheme by which prizes are distributed to the winners among those persons who have paid for a chance to win them, usu. as determined by the numbers on tickets as drawn at random (as from a lottery wheel)."

"To similar effect, see Oxford Illustrated Dictionary (1962) and The Random House Dictionary of the English Language, the Unabridged Edition (1967)."

The court has refined the various definitions into three required elements in order to be recognized as a lottery in Kansas. "The court has held that the essential elements of a lottery are three: (1) consideration, (2) prize, and (3) chance. (State, ex rel. v. Bissing, 178 Kan. 111, 283 P.2d 418)." Highwood, 205 Kan. at 823. Using this three element definition the court has adhered to the constitutional provision banning lotteries and struck down such efforts prior to Kan. Const. Art. 15, sec 3c. "The State, ex rel v. Mercantile Association, 45 Kan. 351, 25 Pac. 984, [distribution of prizes by chance]; In re Smith, Petitioner, 54 Kan. 702, 39 Pac. 70, [sale of lottery tickets]; The State, ex rel v. Fair Association, 89 Kan. 238, 131 Pac. 626, [bets on horse races]; State, ex rel., v. Fox Kansas Theatre Co., 144 Kan. 687, 62 P.2d 929, [theater bank night]; City of Wichita v. Stevens, 167 Kan. 408, 207 P.2d 386, [punch boards]; State v. Brown, 173 Kan. 166, 244 P.2d 1190, [punch boards]; State, ex rel. v. Bissing, 178 Kan. 111, [parimutuel betting on dog races]." Nelson, 210 Kan. at 444.

In considering the lottery provision, numerous individuals and state agencies advanced definitions for the term lottery. Included in the minutes were reports that "new forms of lottery games are constantly being invented," Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Ross Mills, Legislative Research Department, Attachment A., and "there are currently several types of lottery products being played . . . weekly game or draw lottery . . . instant lottery ticket . . . online system . . . numbers game . . . pick four." Minutes of the House Federal and State Affairs

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Committee, January 16, 1986, testimony of Secretary of Revenue Harley Duncan, Attachment B.

It was further presented that some states have restricted their lottery to specific games. Minutes of the House Federal and State Affairs Committee, January 21, 1986, testimony of Patrick J. Hurley, Attachment C. The Kansas Legislature did not preclude any specific game or games with the language used in 1986 Senate Concurrent Resolution 1609, L. 1986, ch. 414.

In Attorney General Opinion No. 87-16, this office indicated that:

"[t]he intent and understanding of both the legislature and the people seems to have been to have a government controlled lottery as a revenue raising measure. Minutes of the House Federal and State Affairs Committee, January 21, 1986, testimony of Secretary of Revenue Harley Duncan, Attachment A.

"It appears that the intent of the voters in approving the lottery was to allow closely regulated gambling and to raise money for the state. A multi-state lottery would not be repugnant to the intent of the constitutional provisions."

In our judgment, the game "lotto" would fall within the scope of the Kansas constitutional "lottery" amendment since it is an unrestricted provision. The lottery could include both an active game and a passive game. An active game has been recognized as a lottery game in which the player takes action to determine the outcome by choosing a number or set of numbers to bet on, attempting to match the numbers later drawn. A passive game is a lottery game in which the player takes no active part in determining the outcome; the ticket sold is either a winner or a loser, and no choices of numbers are made. Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Secretary of Revenue Harley Duncan. Attachment B. Again, to be recognized as a lottery the three (3) essential elements must be present in either an active or passive game.

The Kansas Supreme Court in Highwood, supra, came to the conclusion that:

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"In short, we entertain the opinion that not only in 1859, when the constitution was adopted, and in 1895, when K.S.A. 21-1506 was enacted, but in recent years as well, the common understanding of a lottery entertained by men in general has been that a consideration of value must flow from those who participate. We gravely doubt that had the ordinary man in the streets in 1859 been able to envision the advent of television he would have characterized as a lottery the give-away program known as Dialing for Dollars." 205 Kan. at 826.

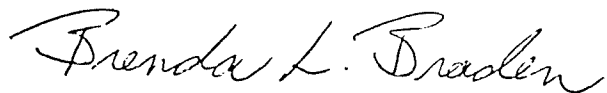
In keeping with the court pronouncement that the definition must remain constant and should withstand the test of time, any game, no matter the extent of player participation or the title assigned to the game, be it "lotto" or "casino gambling," as long as it is state owned and operated and involves the essential elements discussed above, it would be classified as a lottery.

It is therefore our opinion that a state-owned and operated lottery could include any game or combination of games as long as there is consideration, chance and prize involved in each game. Such a game would not be repugnant to the intent of the constitutional provision.

Very truly yours,



Robert T. Stephen
Attorney General



Brenda L. Braden
Deputy Attorney General

RTS:BLB:may

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July 14, 1987

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ATTORNEY GENERAL OPINION NO. 87- 101

Phillip A. Burdick
Brown County Attorney
112 South 7th Street
Hiawatha, KS 66434

Re: Crimes and Punishment -- Code; Crimes
Against the Public Morals -- Pull Tab
Games on Indian Reservations

Synopsis: The term "lottery" includes pull tab games and any game or combination of games involving consideration, chance and a prize. The constitutional amendment permitting a state owned and operated lottery is civil/regulatory in nature and therefore may not be enforced against Indians conducting lottery games on Indian reservations within Kansas. Cited herein: K.S.A. 21-4302; L. 1986, ch. 414; Kan. Const., Art. 15, §§3b, 3c.

* * *

Dear Mr. Burdick:

You request our opinion as to the effect Kansas Constitution Article, 15, section 3c, the "lottery" amendment, will have on the legality of pull tab gaming on the Iowa tribe Indian reservation in Kansas.

Before we answer the question of legality, a more fundamental question must first be answered. Does the term "lottery" as used in the Kansas lottery amendment include "pull tab" type games?

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The constitutional provision as voted on and passed by the Kansas electorate did not define or restrict the term lottery nor did it define or restrict itself to any specific games. Thus, definitional responsibility of defining lottery was passed to the courts of the state. In construing constitutional provisions, the Supreme Court of Kansas has stated in State, ex rel. v. Highwood Services, Inc., 205 Kan. 821, 825 (1970):

"[A] constitution is not to be narrowly or technically construed but its language should be held to mean what the words imply to the common understanding of men; that in ascertaining the meaning of constitutional provisions courts should consider what appears to have been the intent and understanding of the people at their adoption." (Citations omitted).

In Highwood, the court's research included lottery definitions from Abbott's Law Dictionary (1879), Webster's Third New International Dictionary, unabridged, (1964), the Oxford Illustrated Dictionary (1962) and the Random House Dictionary of the English language, the Unabridged Edition (1976). Thus, in defining the term "lottery" the court has adopted common usage definitions of lottery:

"a scheme for the distribution of prizes by lot or chance; esp.: a scheme by which prizes are distributed to the winners among those persons who have paid for a chance to win them, usu. as determined by the numbers on tickets as drawn at random (as from a lottery wheel)."

The court further refined the various definitions into three required elements in order to be recognized as a lottery in Kansas. "The court has held that the essential elements of a lottery are three: (1) consideration, (2) prize, and (3) chance." Highwood, 205 Kan. at 823. Using this three element definition the court had adhered to the constitutional provision banning lotteries and struck down such efforts prior to the enactment of Kan. Const. Art. 15, sec. 3c. The State, ex rel v. Mercantile Association, 45 Kan. 351 (1891) [distribution of prizes by chance]; In re Smith, Petitioner,

54 Kan. 702 (1895) [sale of lottery tickets]; State ex rel., v. Fox Kansas Theatre Co., 144 Kan. 687 (1936) [theater bank night]; City of Wichita v. Stevens, 167 Kan. 408 (1949) [punchboards]; State v. Brown, 173 Kan. 166 (1952) [punchboards].

In considering the lottery provision, numerous individuals and state agencies advanced definitions for the term lottery. Included in the minutes were reports that "new forms of lottery games are constantly being invented," Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Russ Mills, Legislative Research Department, Attachment A., and "there are currently several types of lottery products being played ... weekly game or draw lottery ... instant lottery ticket ... online system ... numbers game ... pick four." Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Secretary of Revenue Harley Duncan, Attachment B.

It was further presented that some states have restricted their lottery to specific games. Minutes of the House Federal and State Affairs Committee, January 21, 1986, testimony of Patrick J. Hurley, Attachment C. The Kansas Legislature did not preclude any specific game or games with the language used in 1986 Senate Concurrent Resolution 1609, L. 1986, ch. 414. (Emphasis added).

In our judgment the game of "pull tabs" would fall within the scope of the Kansas constitutional lottery amendment since it is an unrestricted provision.

In Attorney General Opinion No. 87-38, this office indicated that:

"The lottery could include both an active game and a passive game. An active game has been recognized as a lottery game in which the player takes action to determine the outcome by choosing a number or set of numbers to bet on, attempting to match the numbers later drawn. A passive game is a lottery game in which the player takes no active part in determining the outcome; the ticket sold is either a winner or a loser, and no choices of numbers are made. Minutes of the House Federal and State Affairs Committee,

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January 16, 1986, testimony of
Secretary of Revenue Harley
Duncan. Attachment B."

To be recognized as a lottery, three essential elements must be present in either an active or a passive game, (1) consideration, (2) prize and (3) chance. K.S.A. 21-4302(2). In an earlier case, Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, 787 F.2d 1434 (10th Cir. 1986), the United States Court of Appeals defined "pull tabs" as a game of chance wherein a factory sealed cover is removed from a paper card to reveal what if any prize is won. Hence, "pull tab" games squarely fit into the description of passive game as set forth above and would constitute a lottery.

This office sees no great dissimilarity in removing a factory sealed cover from a paper card as compared to scratching out a latex box on a paper ticket similar to those currently used in the Missouri, Iowa and Illinois instant lotteries.

Having determined the Kansas lottery amendment to be inclusive of pull tab games, we now turn our attention to the legality of these pull tab games on the Iowa tribe Indian reservation in Kansas. The issue of legality turns on whether the lottery amendment is prohibitory or regulatory in nature.

Prior to 1974, the operation of all forms of lotteries, including bingo, was expressly prohibited under the provisions of Article 15, Section 3 of the Kansas Constitution. State, ex rel., v. Kalb, 218 Kan. 459, 465 (1975). In 1974, the Kansas Constitution was amended to permit the playing of bingo by certain specified organizations. In 1987 the Kansas Constitution was again amended to permit not only a state owned lottery but also to allow for parimutuel betting on horse and dog racing.

In the recent case State of California, et al. v. Cabazon Bank of Mission Indians, 107 S.Ct. 1083 (1987), the Supreme Court upheld the right of Indian tribes to engage in, or license and regulate, gaming activities on the reservations free of state licensing and regulation. The court noted that this right arises, under Federal Indian Law, where a state permits this kind of activity and regulates it as a matter of civil/regulatory law.

In Cabazon, supra, California had attempted to prohibit bingo games on Indian Reservations in that state. The Federal District Court held that neither the state nor the county had

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any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed.

In affirming the judgment of the Court of Appeals the Supreme Court applied a shorthand test of whether the conduct at issue violates the state's public policy. The Supreme Court relied on the Court of Appeals reasoning that if the intent of a state law is generally to prohibit certain conduct it will be criminal/prohibitory in nature. However, if the state law generally permits the conduct at issue, subject to regulation, it will be classified as civil/regulatory and therefore unenforceable on Indian reservations. In deciding that the California bingo statute was civil/regulatory in nature, the Supreme Court noted that California does not prohibit all forms of gambling. The court noted further that California operates a state lottery and encourages its citizens to participate in this state run gambling. Also the court noted that California permits parimutuel horse race betting. Finally the court stated:

"In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general."

With the adoption of the state "lottery" amendment, Kan. Const., Art. 15, §§3b and 3c, Kansas now provides for state owned and operated lotteries as well the regulation of parimutuel betting on horse and dog racing. Adopting the Supreme Court's rationale in Cabazon and applying it to the Kansas "lottery" amendment we see that Kansas, like California, no longer prohibits all forms of gambling. As in Cabazon where California operated a state lottery and encouraged its citizens to participate, so too will Kansas operate a state lottery and encourage participation. The court also noted in Cabazon that California allows parimutuel betting on horse races. Similarly Kan. Const., Art. 15, §3b allows parimutuel betting on horse and dog racing.

With the passage of the state "lottery" amendment, participation in this state-run gambling is no longer contrary to the public policy of the state. The "lottery" amendment now permits rather than prohibits, subject to regulation, lotteries as well as parimutuel betting on dog and

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horse racing in Kansas. Accordingly the "lottery" amendment must be considered civil/regulatory in nature rather than criminal/prohibitory. We are compelled by the ruling in the Cabazon case to conclude that the Kansas lottery amendment may not be enforced against Indians conducting lottery games upon Indian reservations within the territorial boundaries of the State of Kansas.

It is therefore our opinion that the definition of lottery includes the game of pull tabs and any game or combination of games as long as there is consideration, chance and prize involved in each game. Further, it is our opinion that the state lottery amendment is civil/regulatory in nature, and therefore, provisions relating to the conduct of lottery games by Indians on reservations may not be enforced.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Brenda L. Braden
Deputy Attorney General

RTS:BLB:cy

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STATE OF KANSAS

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September 30, 1991

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ATTORNEY GENERAL OPINION NO. 91- 119

The Honorable Edward F. Reilly, Jr.
State Senator, Third District
430 Delaware
Leavenworth, Kansas 66048-2733

Re: Constitution of the State of Kansas--Miscellaneous--
Lotteries; Indian Gaming Regulatory Act

Synopsis: The federal Indian gaming regulatory act authorizes Indian tribes to conduct class III gaming activities (such as slot machines, parimutuel wagering on horse and dog races, jai alai and banking card games) on Indian lands located in any state which "permits such gaming for any purpose by any person, organization, or entity" pursuant to a tribal-state compact. The state of Kansas itself is constitutionally permitted to conduct any game involving the elements of consideration, chance and prize and therefore any game including these three elements may be negotiated for inclusion in a tribal-state compact. The state may refuse to include such games in the compact only if the state in good faith believes the conduct of a particular game involving these elements would be detrimental to the public welfare. A tribal-state compact may provide for licensing and regulation of gaming on Indian lands by the state lottery office, or any other state agency with expertise in the area. 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. Cited herein: K.S.A. 1990 Supp. 74-8701; 74-8801; K.S.A.

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79-4701; Kan. Const., art. 1, § 3, art. 15, §§
3a, 3b, 3c; 25 U.S.C. §§ 2703, 2705, 2706, 2710.

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Dear Senator Reilly:

You request our opinion regarding the federal Indian gaming regulatory act, 25 U.S.C. §§ 2701 et seq. Specifically your questions are as follows:

"In general, what are the requirements of federal law regarding establishment of class III gaming on American Indian reservations? How do those requirements impact Kansas given the constitutionally limited types of gambling allowed in the State?

"What federal requirements are imposed regarding state/tribal agreements for class III gaming, i.e., what elements must be included in such an agreement?

"Would it be possible for the State Lottery, as the only State agency with direct experience operating a gaming activity, to be engaged in oversight and operation of class III gaming operations on a reservation?

"Does the Legislature have any role in negotiations with American Indian tribes regarding establishment of class III gaming on tribal lands, or can the Governor unilaterally enter into such an agreement? In connection with that question, can the Legislature prevent such an agreement from taking effect?"

The Indian gaming regulatory act (IGRA) provides for the regulation of gaming on Indian lands. The act classifies gaming into three categories; the provisions for regulation differ depending upon the class. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or

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celebrations." 25 U.S.C. § 2703(6). Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribe and is not subject to the IGRA. 25 U.S.C. § 2710(a)(1). Class II gaming is essentially bingo and non-banking card games, although certain other games were grandfathered in for certain tribes. 25 U.S.C. § 2703(7). Class II gaming on Indian lands is also within the jurisdiction of the Indian tribe, but subject to the IGRA and is regulated in part by the national Indian gaming commission. 25 U.S.C. §§ 2710(a)(2); 2705; 2706. Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class III gaming generally includes "slot machines, casino games including banking card games, horse and dog racing, pari-mutuel, jai alai, and so forth." S.Rep.No. 100-446, 100th Cong., 2nd Sess. 5, reprinted in 1988 U.S. Code Cong. & Ad. News 3071, 3073. [Banking card games are those games in which the players play against the house and the house acts as banker; non-banking card games are those in which players play against each other. Id. at 3079.] Class III games may be operated on Indian lands in states that permit such gaming activities and are to be regulated pursuant to a tribal-state compact. 25 U.S.C. § 2710(d)(1), (3). Class III gaming is the focus of this opinion.

The requirements for establishing Class III gaming on Indian lands are stated in 25 U.S.C. § 2710(d).

"(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

"(A) authorized by an ordinance or resolution that--

"(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

"(ii) meets the requirements of subsection (b), and

"(iii) is approved by the Chairman,

"(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

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"(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

. . . .

"(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact. . . ."

The Kansas constitution now permits several forms of gaming: Article 15, section 3 authorizes the legislature to "regulate, license and tax the operation or conduct of games of 'bingo' as defined by law, by bona fide nonprofit religious, charitable, fraternal, educational and veterans organizations"; section 3b of article 15 authorizes the legislature to "permit, regulate, license and tax . . . the operation or conduct, by bona fide nonprofit organizations, of horse and dog racing and parimutuel wagering thereon. . . . No off-track betting shall be permitted . . ."; section 3c allows the legislature to "provide for a state-owned and operated lottery. . . ." Statutes regulating bingo operations are contained in K.S.A. 79-4701 et seq., those permitting and regulating parimutuel wagering are located at K.S.A. 1990 Supp. 74-8801 et seq., and K.S.A. 1990 Supp. 74-8701 et seq. establish the Kansas lottery.

Clearly bingo, on track parimutuel wagering and state owned and operated lottery games such as pulltabs, lotto, instant scratch games and draws are permitted in Kansas, although all are heavily regulated. The question is whether video lottery, slot machines, black-jack and other class III gaming activities are currently permitted. We believe that, for purposes of the IGRA, they are and may therefore be the subject of negotiation over a tribal-state compact. In Attorney General Opinion No. 87-38 we concluded that, because the term lottery has been defined broadly by the Kansas courts to include any game involving the three elements of

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consideration, chance and prize, and since article 15, section 3c does not limit the types of games the state may conduct, the state is constitutionally authorized to operate any game involving the three elements "be it 'lotto' or 'casino gambling'." It has been suggested that the legislature must specifically provide for these types of games and that they be played in the state in order for such games to be deemed "permitted." The United States district court for the western district of Wisconsin rejected this position in Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, ___ F.Supp. ___, case no. 90-C-408-C (W.D. Wisc. 1991). (This case is currently being appealed but, as of the date of this opinion, has not been reversed.) The court found that the term "permit" does not necessarily imply the need for express authorization. Additionally we note that language in the IGRA appears to support this conclusion. 25 U.S.C. § 2703, in describing the types of card games included in class II gaming, states:

"(7) (A) The term 'class II gaming' means--

. . . .

"(ii) (I) card games that --

"(I) are explicitly authorized by the laws of the State, or

"(II) are not explicitly prohibited by the laws of the State and are played at any location in the State. . . ."

Card games that do not fall within this definition are class III games. S.Rep.No. 100-446, supra at 3079. The IGRA does not specify that the negotiability of particular class III games is dependent upon those games being explicitly authorized or actually played in the state, but merely that they be "permitted." Thus, we believe any game involving the elements of consideration, chance and prize are negotiable in Kansas, but the tribe and state will have to reach an agreement regarding any class III games before those games may be conducted on Indian lands within the state. If the state in good faith believes that the operation of certain games within the state would be contrary to the public interest or endanger public safety, it may refuse to include such games in the compact. See 25 U.S.C. § 2710(d) (7) (B) (iii) (I).

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You inquire next as to the elements which must be included in a tribal-state compact for class III gaming on Indian lands. The act does not require the inclusion of any specific provisions. However, 25 U.S.C. § 2710(d)(3)(C) lists several provisions which may be included in a tribal-state compact entered into pursuant to the IGRA:

"(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

"(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

"(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

"(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

"(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

"(v) remedies for breach of contract;

"(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

"(vii) any other subjects that are directly related to the operation of gaming activities."

A provision seeking to tax the tribe's class III gaming operations is specifically prohibited, 25 U.S.C. § 2710(d)(4), but the state may charge for the regulatory or other services it provides under the compact.

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You ask whether it would be possible for the Kansas lottery office to oversee and assist in operating class III gaming on Indian lands. The IGRA does not preclude such an arrangement. In fact, the act appears to intend that type of agreement. Throughout the senate report on the IGRA are comments regarding the absence of federal or tribal entities to regulate class III gaming and the states' expertise in this area, thus sparking the provision for tribal-state compacts. See S.Rep.No. 100-446, supra at 3075 ("the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies . . .", "the mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-state compact"), 3083 ("there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems. . . . Thus the logical choice is to make use of existing State regulatory systems . . ."). Thus, not only may the lottery office be used, but law enforcement agencies such as the KBI and other regulatory agencies such as the Kansas racing commission may be of assistance.

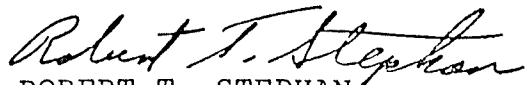
Finally, you question whether the legislature has any role in establishment of class III gaming operations on Indian lands. The IGRA does not speak to the issue of what procedures are involved in negotiating and executing a compact to bind the state. Apparently that is to be determined pursuant to state law. "All governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions." Leek v. Theis, 217 Kan. 784, syl. ¶ 7 (1975). "It has been said that the executive power is more limited than legislative powers, extending merely to the details of carrying into effect laws enacted by the legislature as they may be interpreted by the courts, the legislature having the power, except where limited by the constitution itself, to stipulate what actions executive officers shall or shall not perform." 16 Am.Jur.2d Constitutional Law § 303 (1979). Essentially, the governor, as chief executive officer of the state, is to see that the law is executed and administered. Kan. Const., art. 1, § 3; State, ex rel., v. Fadely, 180 Kan. 652, 670 (1957). It is for the legislature to determine public policy and enact the laws accordingly. Id.; 16 Am.Jur.2d Constitutional Law § 318 (1979).

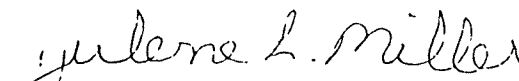
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The Kansas constitution makes no express grant to the governor of power to bind the state to compacts such as the tribal-state compact provided for in the IGRA. Neither has the legislature granted this power through legislation. Binding the state to such a compact requires a determination of public policy and enactment of law, and is therefore a function for the legislature to perform. The legislature must either ratify the compact or authorize the governor to formulate and execute it. Thus, while the governor may participate in the negotiation process, submit a proposed compact agreement to the legislature, and/or execute the compact, legislative action is required to make the compact legally binding and enforceable against the state.

In conclusion, the federal Indian gaming regulatory act authorizes Indian tribes to conduct class III gaming activities (such as slot machines, parimutuel wagering on horse and dog races, jai alai and banking card games) on Indian lands located in any state which "permits such gaming for any purpose by any person, organization, or entity" pursuant to a tribal-state compact. The state of Kansas itself is constitutionally permitted to conduct any game involving the elements of consideration, chance and prize and therefore any game including these three elements may be negotiated for inclusion in a tribal-state compact. The state may refuse to include such games in the compact only if the state in good faith believes the conduct of a particular game involving these elements would be detrimental to the public welfare. A tribal-state compact may provide for licensing and regulation of gaming on Indian lands by the state lottery office, or any other state agency with expertise in the area. 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.

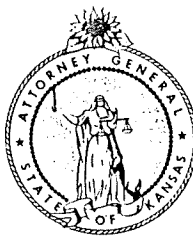
Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

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STATE OF KANSAS

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December 19, 1991

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ATTORNEY GENERAL OPINION NO. 91- 160

The Honorable Clyde D. Graeber
State Representative, Forty-First District
2400 Kingman
Leavenworth, Kansas 66048-4230

Re: Constitution of the State of
Kansas--Miscellaneous--Lotteries; Indian Gaming
Regulatory Act; Gaming on Lands Acquired After
October 17, 1988

Synopsis: 25 U.S.C. § 2719 authorizes use of land acquired in
trust for an Indian tribe outside the tribe's
existing reservation for tribal gaming purposes if,
upon consultation with the tribe and state and
local officials, the secretary of the interior and
the state governor determine that locating a gaming
establishment on such lands would be in the best
interests of the tribe and would not be detrimental
to the community surrounding the proposed site.
Cited herein: 25 U.S.C. §§ 465-467, 468, 2703,
2710, 2719.

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Dear Representative Graeber:

You seek our opinion regarding the Indian gaming regulatory
act, 25 U.S.C. §§ 2701 et seq. Specifically you inquire
whether lands given to an Indian tribe become part of that
tribe's reservation and thus eligible for establishment of a
class III gaming parlor or casino.

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The Indian gaming regulatory act (IGRA) authorizes the conduct of class III gaming activities by tribes "on Indian lands" under certain circumstances and pursuant to a tribal/state compact. 25 U.S.C. § 2710(d)(1). The term "Indian lands" is defined as:

"(A) all lands within the limits of any Indian reservation; and

"(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4).

The tribe must have jurisdiction over the land sought to be used. 25 U.S.C. § 2710(d)(1)(A)(ii) and (b).

However, the IGRA specifically contemplates use of lands outside the reservation acquired by the secretary of the interior in trust for a tribe after the effective date of the act for conduct of gaming when:

"(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

"(B) lands are taken into trust as part of--

"(i) a settlement of a land claim,

"(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

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"(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1).

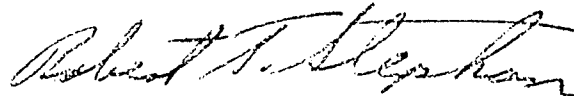
Legislative history provides the following interpretation of 25 U.S.C. § 2719:

"Gaming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination." S.Rep.No. 100-446, 100th Cong., 2nd Sess. 5, reprinted in 1988 U.S. Code. Cong. & Ad. News 3071, 3078. See also Texas Attorney General Opinion No. DM-32 (Aug. 6, 1991).


25 U.S.C. § 465 further defines the method for acquiring new lands for the benefit of Indian tribes. See also 25 U.S.C. §§ 467, 468.

Thus, 25 U.S.C. § 2719 authorizes use of land acquired in trust for an Indian tribe outside the tribe's existing reservation for tribal gaming purposes if, upon consultation with the tribe and state and local officials, the secretary of the interior and the state governor determine that locating a gaming establishment on such lands would be in the best interests of the tribe and would not be detrimental to the community surrounding the proposed site. This opinion does not address the question of whether the United States Congress has authority to determine which branch of state government may make the determination required by 25 U.S.C. § 2719(b)(1)(A).

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm

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January 2, 1992

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ATTORNEY GENERAL OPINION NO. 92- 1

The Honorable Edward F. Reilly, Jr.
State Senator, Third District
430 Delaware
Leavenworth, Kansas 66048-2733

Re: Constitution of the State of Kansas--
Miscellaneous--Lotteries; Indian Gaming Regulatory
Act

Synopsis: If the legislature and the electorate choose to remove the constitutional authority for a state-owned and operated lottery, the types of class III games Indian tribes could conduct in this state pursuant to a compact would be limited to on-track parimutuel wagering on horse and dog races, as this would be the only permissible class III gaming anywhere in the state. A tribe may not conduct simulcasting/wagering operations pursuant to a compact or otherwise since such conduct is currently prohibited by state law. Statutorily prohibiting certain specific class III games, if across the board (i.e. no one, including the state, may conduct or participate in it), would foreclose the ability to include those specific games in a compact. 25 U.S.C. § 2719(d) specifically makes provisions of the Internal Revenue Code concerning the reporting and withholding of taxes on winnings applicable to Indian gaming operations.

As long as the state owns the business and has ultimate and complete control of the operation, article 15, section 3c of the constitution does not require that the state actually own the building or equipment used in a lottery operation. Cited

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herein: Kan. Const., Art. 15, §§ 3b, 3c; 25
U.S.C. § 2719(d).

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Dear Senator Reilly:

You request our opinion regarding gambling in the state of Kansas. We address your questions about Indian gaming first.

"Does the constitutional provision allowing parimutuel wagering, like that allowing for a state lottery, result in the possibility that type III gambling (which includes a wide variety of gaming activities) can be conducted on reservations in Kansas? Would the Legislature be forced to propose amending the Constitution to remove or alter existing permissive language regarding both kinds of gambling in order to prohibit casino gambling in the state?"

The Kansas Supreme Court has held that parimutuel wagering on horse and dog races, if it includes the three elements of consideration, chance and prize, constitutes a lottery. State, ex rel., v. Bissing, 178 Kan. 111, 119 (1955). This is due to the broad definition attributed to the term "lottery" by our courts, see State, ex rel., v. Merchantile Assn., 45 Kan. 351, 353 (1891); State, ex rel, v. Fox Kansas Theater Co., 144 Kan. 687, 692 (1936), and the fact that the term has not been otherwise defined by the constitution. While parimutuel wagering has been held to be a form of lottery, we do not believe the courts would find in the reverse. Article 15, section 3b of the constitution is specific in terms of what it allows: "the operation or conduct . . . of horse and dog racing and parimutuel wagering thereon . . . [excluding off track betting]." Further, we do not interpret the Indian gaming regulatory act (IGRA) to open the door to all class III games solely because one particular class III game is permitted. See Mashantucket Pequot Tribe v. State of Conn., 737 F.Supp. 169, 176 (D.Conn. 1990) ("The type of gaming permitted is identified by the type of play permitted, not by bet, frequency, and prize limits."); U.S. v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 365 (8th

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Cir. 1990) ("we believe that the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity."); Lac Du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, ___ F.Supp. ___, Op. No. 90-C-408-C, 18 (W.D. Wisc. 1991). Thus, if the legislature and the electorate choose to remove the constitutional authority for a state-owned and operated lottery, we believe the types of class III games Indian tribes could conduct in this state pursuant to a compact would be limited to on-track parimutuel wagering on horse and dog races, as this would be the only permissible class III gaming anywhere in the state.

"Since simulcasting of horse or dog races has not been authorized by statute, can parimutuel wagering on dog or horse races simulcast to American Indian gambling establishments be included among the array of gambling permitted by compacts with American Indian tribes? If so, would that constitute off-track betting which is banned by the Kansas constitution?"

The fact that simulcasting is not specifically authorized by statute or currently conducted in Kansas (see Attorney General Opinion No. 88-116) is of no consequence; what is important is whether the conduct is permitted, as opposed to prohibited. See Attorney General Opinion No. 91-119. Article 15, sections 3b and 3c together permit the state to conduct or provide for simulcasting. However, we have previously opined that Kansas statutes prohibit simulcasting. Attorney General Opinion No. 88-116. Thus, a tribe may not conduct simulcasting/wagering operations pursuant to a compact. Even if simulcasting was permissible, since off-track betting is constitutionally prohibited, Indian tribes could not simulcast horse and dog races for the purpose of betting thereon unless the wagers were placed at a racing facility (track).

"In the absence of a law permitting simulcasting in Kansas, could American Indian gambling establishments receive simulcast race signals from tracks

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outside the state, whether or not betting is allowed on those simulcast races?"

See answer given above.

"Could specific kinds of gambling, e.g., casino gambling, sports book, betting on simulcast races, etc., be prohibited for all persons by statute as a means of limiting types of gambling allowed by a compact between the state and a tribe, notwithstanding existing constitutional provisions? That is, would such a prohibition need to be constitutional, or is a statutory prohibition sufficient?"

The IGRA does not specify how the state may prohibit or permit certain class III games. In other words, the federal law does not require the prohibition or permission of games be by constitutional provisions. Thus, in our opinion, statutorily prohibiting certain specific class III games, if across the board (i.e. no one, including the state, may conduct or participate in it), would foreclose the ability to include those specific games in a compact. Lac Du Flambeau Band of Lake Superior Chippewa Indians, supra at 20. ("[T]he state is required to negotiate with [tribes] over the inclusion in a tribal-state compact of any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin constitution or state law). (Emphasis added).

"Finally, in regard to enforcement of existing, nongambling related laws on American Indian reservations: Would such gambling establishments have a responsibility to the state or to the federal Internal Revenue Service to report individuals' winnings in order to ensure those winnings are taxed? If not, how could the state ensure that winners pay applicable income tax on their winnings?"

25 U.S.C. § 2719(d) specifically makes provisions of the Internal Revenue Code concerning the reporting and withholding of taxes on winnings applicable to Indian gaming operations.

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"What types of arrangements with regard to video lottery machines satisfy the constitutional requirement that the Kansas lottery be state-owned and operated?

"Presumably the requirement would be met if the Kansas Lottery owned or leased the machines and either placed and maintained the machines, or contracted with a private entity to place and maintain them. However, can the Kansas Lottery:

"-- contract with private entities to place and maintain privately-owned video lottery machines;

"-- issue licenses or certificates authorizing private entities to place and maintain privately-owned video lottery machines; and

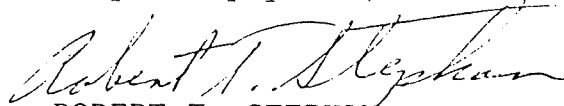
"-- receive a set percentage of the income from privately owned, placed, and maintained video lottery machines, with the remainder of the income going to the private entity or entities owning, placing, and maintaining those machines?"

Article 15, § 3c of the Kansas constitution authorizes the legislature to "provide for a state-owned and operated lottery. . . ." This office has previously stated that this provision "does not necessarily require that the state own the actual structure in which the lottery is conducted, or the equipment which is used in the operation. [A]s long as the state owns the business and has ultimate and complete control of the operation, it is not necessary that the state actually own the building or the equipment used in the operation." Letter to Senator Edward Reilly, dated February 15, 1991. It is our understanding that under the scenario you present, the state will, through legislation, rule and regulation and contract terms, determine and actively control the types of games to be allowed, the odds of winning, the stakes to be won, the amount of consideration required to play and the percentage of take for the state and others. The state will also determine where the machines will be placed as well as certifying such locations. These factors evidence state control.

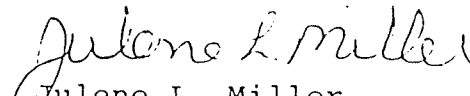
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Clearly, the more control the state retains, the easier it will be to determine that the operation is state-owned and operated. On the other hand, the fewer hands-on roles the state takes, the closer it comes to being state-regulated rather than state-owned and operated. In the example you present, if our understanding is correct, the state retains sufficient control and ownership to be constitutionally sound.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas .



Julene L. Miller
Deputy Attorney General

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