Approved June 26, 1992

MINUTES OF THE JOINT SENATE AND HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Sen. Edward F. Reilly, Jr. at

1:00 p.m. on February 6, 1992 in Room 313-S of the Capitol.

All members were present except:
Sens. Daniels, McClure, Morris and Ward were excused

Committee staff present:
Mary Galligan, Legislative Research Department
Lynn Holt, Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Jeanne Eudaley, Committee Secretary

Conferees appearing before the committee:
Bryan McKay, Former Attorney General of the State of Nevada

Others attending: See attached list

Sen. Reilly called the meeting to order and welcomed committee members and thanked Mr. McKay for speaking to the Joint Committee. Sen. Reilly read Mr. McKay's biography (Attachment 1). Rep. Sebelius introduced Bryan McKay and stated Mr. McKay will give an overview (Attachment 2) to the Joint Committee and focus on what is happening in other states.

The Joint Committee adjourned at 2:45.

GUEST LIST

J. Comm.

COMMITTEE: Senate Federal & State Affairs DATE: Feb 6, 1992

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
HAL WALKER	701 N. 7th KC KS	City Hall KCKS
George Wingert		Gov.
David L. Ross	1401 1st Ave E HORTON KS	
Kyle Smith	Topeka	KBI
" Ballou	Topeka	Self
Kenda Bartlett	Leavenworth	CWA of KS
Mark Wheeler	Lawrence	KU
Merle Hee	Topeka	KACC
Bill McCormick	Topeka	Gov.
HAROLD PITTS	"	AARP-CCTF
Doug S Bail	City Hall	City of KCK
George Barbee	I-G-T	Topeka
Dick Bourbeau	KC	Sportsman Racing
Rob Yarnell	Horton KS	People Against Casinos
Bill Brown	KC.	KS LBA Dealer
Bob Sherburne	Topeka	Kansans FTC
Doug Smith	Topeka	Mid American Gaming
J A Pierson	Topeka	Mid american Gaming
Nick Roach	Topeka	Barbee & Assoc.
Janet Chubb	Topeka	AG
[illegible]	[illegible]	[illegible]
Whitney Damron	Topeka	Pete McGill & Associates
Jeff Wagnon	Topeka	Senate
[illegible]	TOPEKA	KGHRA
DANA NELSON	TOPEKA	KRC

GUEST LIST

COMMITTEE: Senate Federal & State Affairs DATE: _____

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
John N. Roberts	topeka	Kansas Lottery
Carl Anderson	"	" "
Ralph Decker	Topeka	Kansas Lottery
Derieth L. Sutton	Topeka	Kansas Lottery
Patrick Hurley	Topeka	Regent Assoc.
Nancy Zielke	Kansas City	City of KCK
BRIAN MCKAY	RENO Nev.	Lionel Sawyer + Collins
Paul McDowell	Topeka	Kansas City
John Bottenberg	"	"
ELIZABETH E. TAYLOR	"	FND. TOBACCO WISES
Cinda Jorgensen		TAYLOR & ASSOC.
Jan Bo	Topeka	Sunflower
Denny Burgess	Topeka	Sunflower
Dillon Jones	Topeka	KBI
Ted Clark	topeka	KIST
John McCaleb	"	KIBI
Doug Ecker	"	Self
Stacy Robinson	"	
Nancy Kendall	"	L of Voters
Michelle Cox michelle cox	Topeka KS	Washburn Univ
MELINDA CLARK	Topeka	Washburn Univ
Ed. Gross	TOPEKA	Self
Lucille A. Wagner	Hutchinson Ks	

GUEST LIST

COMMITTEE: Senate Federal & State Affairs DATE: Feb. 6th

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Rev. Jim Thompson	4975 S. Hackle, Wichita	
Greg Farmer	Lawrence	UDK
Laura McClure	Glen Elder	Self
Kathy Returm	Topeka	McPherson Assoc
DC Coon		
Bruce Linville		
Joe Hamilton		51st Rep.
Galen Weston		Ret Rep
Carol Sader		
Ruth Ann Hackler		
Chris Ahrens	KCKS	
Connie Craig	House Fed & State	
Sen Jerry Lee		

Attach.

LIONEL SAWYER & COLLINS
ATTORNEYS AT LAW
1100 VALLEY BANK PLAZA
50 WEST LIBERTY STREET
POST OFFICE BOX 2610
RENO, NEVADA 89505
(702) 788-6666

FAX (702) 786-6672

ATTORNEY BIOGRAPHY

BRIAN McKAY:

Areas of Practice:

Mr. McKay is a partner in the firm's administrative law and litigation departments. He is an acknowledged national expert in the regulation and control of legalized gaming, and has been instrumental in the development and implementation of the Indian Gaming Regulatory Act. Mr. McKay, while serving as Nevada's Attorney General, coordinated the efforts of the state and the National Association of Attorneys General during the creation of IGRA, and subsequently has assisted various states and the National Indian Gaming Commission in establishing appropriate regulations under which IGRA is to be administered. Additionally, Mr. McKay has been retained by Kansas City, Kansas for the purpose of creating tribal/state/city compacts that will permit Indian tribes to conduct gaming operations off the reservation with the support of both the state and local government. Additionally, he has provided legal counsel and advice to numerous states on matters related to gaming.

As the immediate past Attorney General for Nevada, Mr. McKay has broad experience in administrative law and governmental relations, as a recognized authority on water law, and has an impressive record of personally representing the citizens of Nevada before state and federal appellate courts, including the Supreme Court of the United States.

Professional Distinctions:

Mr. McKay was a Deputy Attorney General from 1975 to 1979, serving as legal counsel to the Nevada Equal Rights Commission, special counsel to the University of Nevada for NCAA enforcement procedures, and represented the state's interests in all water and energy matters related to the Colorado River. Mr. McKay was in the private practice of law

House Federal & State Affairs
February 6, 1992
attachment #1

in Las Vegas from 1979 to 1982 and was elected as Attorney General in 1982 and re-elected in 1986. During that tenure, he served as the Chairman of the National Association of Attorneys General Commerce, Insurance, and Supreme Court Committees, in addition to serving as Chairman of the Nuclear Waste Committee and as a member of the Federal Trade Commission working group. Mr. McKay also served as Chairman of the Conference of Western Attorneys General.

Mr. McKay serves on the Board of Directors of the State and Local Legal Center, a public interest law firm that represents the interest of state and local government. He also served as a board member of Westrends, a group composed of representatives from 13 Western states formed to monitor and analyze emerging trends in the rapidly growing Western region, and currently serves as a Board Member Emeritus.

Education:

Albany Law School of Union University, J.D., 1974

Colgate University, A.B., 1971

Attach 2

February 6, 1991

Testimony being given to the Joint Committee on Federal and State Affairs House and Senate of the Kansas Legislature by Mr. Bryan McKay, former Attorney General of the state of Nevada, and a requested conferee to appear before the Committees to share with them information he has relative to the Indian Gaming Regulatory Act. Thank you very much Mr. Chairman, Madam Chair, and members of the Committees today. I appreciate the opportunity and I am please to be hear in Topeka, and I hope that I can provide you with some answers as it relates to the Indian Gaming Regulatory Act or to the regulation of gambling generally. I should start with a caveat and that is as Chairman Sebelius said, this act has only been in effect for a little over than three years. There has been numerous law suits, there have been numerous interpretations about how the act is suppose to be implemented, so there aren't definitive answers in the lot of the areas involving the Indian Gaming Regulatory Act, and the relationship that the state and the legislature or anybody else may play as its relates to it's implementation. I would like to give you just a very brief background leading up to the enactment in 1988 of this particular piece of legislation because I think it will put things in perspective and if I see your eyes start to glaze over, I'll recognize that you either heard this before or there is too much detail. This all came about really in 1979 when the state of Florida attempted to regulate high stakes bingo operations on the Seminole Reservation in the state of Florida. The tribes sued the state, said they did not have the authority to regulate it, and the tribe was successful. They prevailed in that particular law suit. As a result, certain members of congress began to look at the possibility of enacting Federal legislation, the first serious efforts were in 1985, a bill was almost passed in 1986, but was defeated. In 1987 the United States Supreme Court handed down a decision in the case called Cabazon vs California, that basically affirmed what the court in Florida had said in 1979, that the court could not regulate gambling in any kind on Indian Reservations, but the court also invited Congress to act if they felt it was necessary to provide some type of Federal oversight or legislative scheme. So in 1988, Congress did enact the Indian Gaming Regulatory Act and as you have probably been told in the past, the basics of that are that gambling is divided into three separate categories. Class one, class two, and Class three. Class one, is traditional Indian gaming, and most people including myself don't know what that is, but it doesn't matter, because it doesn't involve a lot of money. People aren't concerned about, it hasn't created problems with the tribes, the states, the Federal Government, or anybody else. Class two gambling is bingo, or bingo related games, certain non-banking card games, and some banking card games that were grandfathered into the act. Class one gambling, nobody can regulate. It's

House Federal & State affairs
February 6, 1992
Attachment #2

up to the tribes. The state has not oversight, the Federal Government has no oversight. Class two, the Federal Government through the National Indian Gaming Commission has the authority to regulate. Class three, which has gotten the most attention, and has become the most continuous throughout the United States, by definition is any other form of gambling that is not class one or class two. It has been the class three area that I have indicated that has caused most of the concern. Class three gambling according to congress is to be regulated through a state tribal contact. It's to be negotiated between the states and between the tribe, and it will set forth what games can be played, how to set fees for the payment of the regulatory process, and every other activity related to that gambling operation. The Federal Government really plays no roll in the class three area. The very first legal development when it came to implementation of the Indian Gaming Regulatory Act, arose out of the state of Connecticut, where a small federally registered tribe, the Massentucket Pequot Tribe, requested the state of Connecticut to enter into compact negotiations for the purposes of allowing that tribe to conduct full scale commercial casino gambling on their reservation in Ledyard, Connecticut. At the time, the state of Connecticut had paramutual wagering, Jai Alai, and lottery, but they prohibited all other forms of commercial gambling. However, Connecticut law also permitted charitable gambling in which certain charities, certain times of the year, under strict regulation and restrictions could keep out what we call Las Vegas night, and play Black Jack, Craps, Roulette, a lot of the other games that we associate with casino gambling. So the tribes said because you do that, we are entitled to negotiate with you, the state of Connecticut, to have those games, and to have them without the restrictions that the Connecticut law places on the charities. The state of Connecticut took the positions that they did not have to sit down and negotiate with the tribes because they did not allow those games and as a result they refused to negotiate. The tribe sued in Federal District Court, and the tribe prevailed. It was appealed to the second circuit, the tribe prevailed, and it was appealed to the United States Supreme Court which did not hear the case, which means it upheld the lower court decision. So the holding in the Connecticut case basically and a lot of people have talked about it, some legal scholars have written about it, but the holding in the Connecticut case was that if a tribe asked to negotiate, and if you have any form of gambling that is permissible in your state, the state has the obligation to sit down and talk to that tribe. It didn't go on to say what they could do or what they couldn't, but you simply have to do that, and that is a requirement under the act. The Connecticut case got worse as it progressed through the court system. Because the act provides that if the state and tribe can't come to an agreement over a compact, there is a long process in their time frame set out, then a federal mediator is appointed, and if that person can't get the two sides to agree, then each side is to submit it's last best offer to the mediator. That

happened in Connecticut, the mediator selected the compact that was presented by the state of Connecticut, and the state then immediately disavowed that particular compact. So under the act, the secretary of Interior then imposes a compact on the state, and in that instance the imposed the compact that was presented by the state. So, the the Connecticut case was the first major one, and from a state's point of view in handling it, in hindsight, and I don't mean to be critical of Connecticut state officials, it could not have been handled in a worse way. The next major case came out of the state of Wisconsin. That is a pending case right now in the seventh circuit court of appeals. There, the state of Wisconsin and the Laktaflambeau tribe negotiated over a compact for commercial casino gambling. The state of Wisconsin would not agree to allow the tribe to conduct numerous commercial class three gaming operations because the state said we don't commit that, and as a matter of fact, we specifically prohibited under Wisconsin law. We're talking about the class of games, black jack, craps, roulette, and the rest. So the tribe sued. The Federal District Court Judge concluded that the Indian Gaming Regulatory Act provides that if a state had any form of class three gambling, any form, even though they prohibit other forms of class three for the rest of their citizens in a commercial operation, that the tribes are entitled to negotiate for any form of class three gambling. That was in the Federal District Court, it has been appealed, in the seventh circuit court of appeals, argument is going to be held on February 19th, and eighteen states have joined the state of Wisconsin in their appeal, because they feel that ruling was much too broadly based, based upon the legislative history and the language of the act. Most recently, I guess Friday of last week or Monday of this week, in another state, in the state of New Mexico, the tribe has filed a bad faith law suit against the state of New Mexico, and the facts are kind of as follows; the Governor of New Mexico ordered his staff to negotiate with the Mesbalero Apache Tribe, for a compact. He publicly stated he that he would consider providing slot machines for these reservations even though it was not permitted under state law, and so the negotiations proceeded along those lines. The Governor's office changed their mind about three weeks ago, and decided that because slot machines are illegal in the state of New Mexico, criminally prohibited, that he was not going to allow the tribes to have slot machines. The negotiations broke down and a law suit has been filed. So that is the latest development on that side of the fence. Another case that is worth watching from legislature's point of view, Governor's point of view, the state's point of view, is what happened in Alabama where the Torch Tribe has sued the state of Alabama for bad faith negotiations. Alabama raised an Eleventh Amendment sovereign immunity defense to that law suit and the Federal District Court ruled in favor of the state of Alabama, and so that's now in appeal to the Fifth Circuit Court of Appeals. If that ruling stands, then it's going to change the whole picture of the implementation of the Indian Gaming

Regulatory Act, because what it means is that tribes will not have a remedy under the Indian Gaming Regulatory Act if they cannot bring suit. That's one that a lot of people who are involved in this issue are looking at very closely. Those are some of the semi horror stories of the bad side, about how negotiations have progressed between the tribes and between the states, but there is an upside too. In a number of states, the state of Washington for example has compacted with two tribes in that state in which they have allowed them to have certain casino games that the state of Washington permits, under it's charitable gambling laws, but not under it's regular gambling prohibition laws. The tribe has gone along with that, they have restricted the hours of operation, they have restricted the number of tables that can be played, they have restricted the amount of wagers, they have shared the jurisdiction for the licensing of both the facility itself, and for the people that work there, and for the review of the management contracts, and to date I know that the state of Washington is very proud of that, and I know that the two tribes with which they have compacted seem satisfied. On the other hand, there are two tribes in the state of Washington that have sued the state for bad faith because they haven't allowed them to have an unlimited gaming operation or have not had a compact for that. The state of California which has numerous reservations and small, what are called rancherias, permits any wide bingo, paramutual racing, card games, poker halls, so they have compacted with a number of the tribes, and the tribes have not asked for the other type of casino games that are allowed, and so there is an excellent relationship in California, to this point and time, between the state and the tribes. The state of Arizona has taken a hardline position. There are proven instances of hundreds and hundreds of slot machines on reservations that are illegal under Arizona law, illegal under federal law, but which the federal government has refused to take any action on. So the state of Arizona, throughout the Governor's office and the Attorney General's office has notified the tribes, or did, as of January 1st, that if they didn't cease these operations, they were going to start to take criminal action, and a lot of illegal activity has stopped. I should go back and say in the state of California, there are also were numerous slot machines, thousands on Indian reservations, that clearly violated state and federal law. The US Attorney's office consistently refused to take any action, and so the Attorney General's office and local law enforcement went in and seized hundreds of machines which are not the subject of very continuous litigation between the tribes and the state, and so they have drawn the line in the sand in California on that particular issue. One the state of Nevada I suppose I throw in here gratuitously, we enacted the first compact between a tribe and a state, we did it in December of 1987, anticipating the 1988 Indian Gaming Regulatory Act. We did that primarily because so many folks on the hill, in Washington D.C., were critical of Nevada's efforts to limit the scope of

the Indian Gaming Regulatory Act. There were allegations that we were anti tribe and we wanted to prove that that was not the case, so we entered into a compact prior to a requirement to do so in which the tribes were allowed to play any games that are allowed in the state of Nevada, and trust me, that's anything except the lottery. We have a constitutional prohibition against the lottery in Nevada, but you can bet on anything else under the sun. So that's kind of an overview as to what has been happening across the country, and there are other examples, but I think that highlights what is important. Another issue that clearly is at the forefront in Kansas, based upon what I have been told and what I read in the newspapers, is who negotiates a compact on behalf of the state? What authority does the legislature have if any, in the process? It varies, again I wish I had a simple answer for you, but it varies depending upon the state, and I don't stand up here to tell what Kansas law is. I am not licensed here and I don't pretend that I know Kansas law. It's clearly a question that relates to that. Other states have grappled with it. The state of Minnesota, when they were first asked to compact with tribes, the Governor told the tribal representatives that he felt he did not have the authority under Minnesota law to enter into such a compact. The legislature, depending on who you talk to, in the Minnesota legislature, the legislature decided that they didn't want to have anything to do with such a difficult issue, and so they passed legislation specifically authorizing the Governor to form a negotiating team, to negotiate with the tribes. He did that. He included the Attorney General, he included two members of the legislature, and I believe somebody from the Economic Development Department. The Washington, for example, the Governor delegated to the Washington Gambling Commission, the authority to negotiate with the tribes. They did that and they included a public hearing process, they had a state caucus made up of the Highway Patrol, the Department of Revenue, The Economic Development Department, Prosecuting Attorney's Association, the sheriff's and Chief's Association, and a whole broad range of people involved in basically the enforcement of state laws. They also formed a local caucus for those particular areas where there would be an impact because of casino operations. The state of Mississippi, the Governor delegated to the Department of Economic Development, the authority to negotiate a compact with tribes. The Governor didn't tell anybody else in the state that fact, and when the state was sued for bad faith negotiations, the first time the Attorney General knew about it was when he was served with a complaint. So I think the lesson in that is that the delegation of authority to enter into something that is as new and potentially complex, is one that you need to look at very carefully. The state of Oklahoma, again its the Governor's office that is conducting the negotiations. The state of Wisconsin, it was the Governor's Office, Governor Thompson had full reign to conduct whatever negotiations he wanted, they have entered

into two compacts, one has been approved, and one currently has not. In the state of Nevada, the authority was delegated to the Nevada Gaming Control Board and the Gaming Commission. As you can see, there is no definitive answer across the country as to who has the authority, who can bind the state in a compact process, and the Indian Gaming Regulatory Act itself does not address that. It just said that the state and the tribes shall negotiate for a compact. Currently, in the United States there are a number of things happening directly related to the Indian Gaming Regulatory Act. The House Interior Committee held oversight hearings in January, and another one day before yesterday on the implementation of the act, and what enforcement activities were going on, the Senate Select Committee on Indian Affairs held a hearing yesterday in Washington D.C., on the same particular topic. I have addressed and testified before the Western Governors' Association, who have expressed concern about the scope of the implementation of the Indian Gaming Regulatory Act, and there is talk that that organization may well seek amendatory language from this Congress. I should point out that Governor Rommer of Colorado, was the moving force behind the WGA's involvement, and he is the incoming chair of the National Governors' Association, has vowed to make that an issue with the National Governors' Association as well. The National Association of Attorneys' General, have formed a special task force to study both Indian gaming and the spread of gambling in the United States generally, because it is something that is clearly and obviously is occurring. That's kind of an overview as to what is happening, I think that a couple miscellaneous comments and then I would be glad to try to respond to any questions you might have. I think the Connecticut case points out a real concern that every state ought to have, and that is that if you can't resolve among yourselves, who is going to speak on behalf of the state, or you don't set up some type of ratification process if the legislature so desires, then there is the very real possibility that the Federal Government is going to step in and tell you what kind of gambling is going to occur in your state, and they are going to tell you whether you can regulate it or not, and they are going to tell you what they are going to have a direct impact on whatever roll you may have, and then you as a state are going to be out of luck. The Connecticut Massentucket case stands for that proposition. Second, I guess gratuitous comment based upon what I read in your newspapers, and trying to prepare for this hearing is that there has been some talk about repealing the authority to conduct a lottery operation to make that criminal prohibited in the state in order to avoid the spread of gambling, be it Indian gambling or state sanctioned gambling or nonsanction gambling, or anything else. I just would point out that if the Wisconsin case stands, that I talked to you about before, you still have paramutual wagering that is lawful in the state of Kansas, and so under that Wisconsin decision just eliminating the lottery still

HF 35A
2-6-92
2-6

would not prohibit the tribes from seeking negotiations from the state for Class three gambling operations. So Mr. Chairman, Madam Chair that's it. Thank you very much for the excellent overview, Mr. McKay, I give you Chairman Sebelius. Thank you. Going back to the point that you just touched on, dismantling laws in order to try and block gaming in the future, can you talk a little bit about where you see the bad (phased ?)issue in that? I mean has fate tempted that? Is there a (?) case, because there has been some talk that if we were to take action which could be demonstrated that specifically aimed at blocking Indian gaming, that it may well be viewed as (that)? case? Can you talk about that a little bit? I'd be glad to discuss it with the upfront again repeating what I said before is that no court has looked at that issue, so I don't know the answer and people have different points of view. I for one believe that the Indian Gaming Regulatory Act does not create an inherent constitutional right for tribes to conduct gambling operations, and if a state wants to prohibit gambling across the board, and do so prior to the tribes relying upon any compact situation, I think the state would have a good defense. I can assure you, there are tribal attorneys throughout this country who disagree vehemently with my beliefs. So there are clearly two sides to the story. Two states have attempted to change their gambling laws in order to try and stop tribes from operating commercial casinos within their jurisdiction. Connecticut was one. Old Connecticut again. After losing right through the court system and the rest, then they attempted to repeal their Las Vegas night provision prior to the tribe opening their casino, which is by the way, this week or next week. But politically the Governor failed in that attempt. The legislature did not go along. The same thing happened in the state of Washington. There was a fairly major effort a year ago in Washington to repeal the Las Vegas night authorizations, but it was unsuccessful again. So from a pure operational political point of view, no state has been able to do that, and I am not aware of any others who are attempting to do that at this point in time. One other question at this point. The point that you mention last, which I think is something that needs to discussed maybe more thoroughly here because the attention so far, the discussion so far, has also been lottery, and does concern (?) into class three gaming, and there really very little focus on our paramutual, separate contributional amendment, and if I understand what your saying correctly, I know that appellate argument is (cough) is in February. If the Wisconsin case stands, even if we were to constitutionally repeal the lottery and get rid of all, and we have to get rid of all lotteries, is that correct?

Including the state pull tab lottery. Under the Wisconsin decision, that is correct. You would have o eliminate. In changing the definition of lottery in eliminating the lottery? That is correct. But in addition to that we would have to eliminate pari-mutual in this state in order to block class three gaming on our basis. The discussion of negotiation of class three gaming we trust. Is that right? Yes. Where does the Wisconsin case stand? If the Wisconsin case goes to the U.S. Supreme Court and is upheld, I have to talk like a lawyer now because the Wisconsin District Court doesn't bind the Kansas district court. But nonetheless, yes, if you carry it to its logical conclusion and the tribe prevails in Wisconsin. And that is what the district court said in Wisconsin that having pari-mutual available allows for negotiations on any other type of class three even though Wisconsin law specifically and criminally prohibits blackjack, craps, slot machines, and other games. Because again there has been some discussion here that narrowing the definition would disallow casino gaming, and if I hear you correctly, that, unless the court changes along the appellate process, that probably is not the case. Yes, I agree with you the tribes would still be entitled if you have any form of class three to ask the state to enter into negotiations for compact for any other game. ? criminal ? Thank you Mr. McKay. Is there a distinguish between civil law and criminal law in respect to the state's authority to exercise jurisdiction over tribal land, and if so, would you discuss that a little bit? There is. That is another bone of contention between tribal attorneys and state attorneys. The Capazan case, the 1987 California case, basically was decided because the courts said that if the state has criminal prohibitory laws on the books, then they have jurisdiction on the reservations and they can stop the tribes from conducting those type of activities. But if the state permits or has civil laws that regulate that activity, then there is a public policy. The court decision says, the public policy that doesn't prohibit the activity and, therefore, the tribes can participate and not necessarily be limited to the regulations applying across the board. Now, was that a terrible explanation? No, it was very good. What if you have a constitution that permits state owned and operated lotteries and what if you have a criminal law which makes casino gambling a criminal activity? What happens? That is kind of where we are in the state of Wisconsin because the state of Wisconsin, I believe, their statute is, excuse me, I believe their lottery provisions, I know their lottery provisions are constitutional. On the other hand they do have criminal prohibitions against certain types of casino gambling. There the judge has said, that doesn't matter, that is a distinction without a difference even though the rest of the people in the state are criminally prohibited from participating in commercial operations. The tribes are not so restricted, or at least the tribes are entitled to go to the state and negotiate. Thank you. You are welcome. Representative Sebelius. Thank you. Mr. McKay, on your

example that you gave regarding if the decision isn't made and you are going to have a federal court coming in and telling you what to do, and what is in Kansas courts, on the reverse side, do the states have a right if a suit is filed in the state court? Does the state have the right to make those decisions regarding a federal? Or the Indian reservation? Not as it relates to anything having to do with the Indian Gaming Regulatory Act, but the jurisdiction for the dispute mechanism, the dispute resolution mechanism, all lies in the federal court system. So you couldn't bring the state tribes into state court. So if a suit was filed, it should be filed in the federal court rather than the state court? As it relates to the bad faith negotiations between the tribe and the state. Now, I can see where you are leading me. I think I can see where you are leading me and I think you are leading me to the current dispute between the Governor and the Attorney General. Is that correct? Well, I would like to know if it is just going to be thrown out and put into federal court, and if we wasting our time right now. Yes. I said I don't want to walk the fine line of Kansas politics. Do you have a magic wand? I have an opinion and I am quite sure I am legally correct. I am not playing the political end. Neither am I. The state cannot sue a tribe unless the tribe agrees to be sued. On the other hand, if the question is whether or not the Kansas Legislature has a role to play in the negotiation process, or who is the appropriate party to do so. I am an old state rightists. It seems to me that is a question of Kansas law that ought to be addressed by the state of Kansas. But that's me. That is my personal opinion. That would only be then between that dispute and again you say the court wouldn't have the right to tell us what to do on the federal or the Indian reservation, or with the Indians? That is correct. The state court would determine what process is necessary to bind the state in a compact with a tribe. Then, first of all and also in regards to the example you gave on saying that if we wanted to oust, just across the board, say gambling wasn't permitted in the state of Kansas. The key words I think you used was as long as you could show that presently there was, that the Indians didn't rely in good faith on something on something already presented to them prior to the fact. I mean, if they had relied on something that already has been done, can you use that argument at this point? The argument certainly can be raised and I should say that I am speculating because no court has addressed the issue because no state has changed its laws for the purpose of stopping the spread of gambling including Indian gambling. But definitely a lawyer can tell you, every lawyer will have a different point of view as to what is a detrimental alliance. What is, do you know, does it involve economics? Does it involve planning? Does it involve policy? So I don't know the answer, but, yes, that argument could be legitimately raised in a law suit by the tribe. Thank you. Senator Bond.

Just as long as you are handing out the ? . I knew I was going to get into trouble. There are many in Washington and throughout the states that believe ? decisions. What is your best guess. Senator as Attorney General I learned every time I guessed what my court was going to do, I was wrong so I stopped doing that. I am of the opinion that the Wisconsin district court decision was much too broad. That if you read the legislative history of the act, especially the comments of the senators and the congressmen who very much wanted to provide the tribes with an economic opportunity and therefore wanted to give them the benefit of the doubt, every stretch of the way, never imagined a court would interpret it in that direction. But they have and the federal courts have consistently except for the Alabama case found for the tribes when it comes to disputes between the tribes and the states. Senator (?). Thank you Mr. Chairman. Under the federal act as to how, or what procedure, and what parties contact us for the negotiation to initiate gambling on reservation lands. There are certain views, of course, from state to state as to whether or not you can ? the governor or the legislature, etc. Once the contact is introduced to, though, and approved and gaming is introduced on reservation land under the federal act, and it appears that any movement off the reservation under the federal act puts all power in the governor. Can you comment on that? I think that was the initial interpretation of the act, but I think it puts all power with the secretary of interior because, I think, the act provides that if there is what is called after acquired non continuous land on which the tribes want to conduct gaming, they have to have that put into trust or reservation status. The secretary of the interior has the authority to do that. The act says that with the concurrence of the governor, which many felt when the act was first promagated, meant the governor had veto authority. I have talked to numerous number of people in the department of the interior who have said, not really, concurrence means that the governor has to have a good reason not to permit it. But if she or he does not, then the secretary may very well grant reservation status to that anyway. Now Secretary Luhon (?) had said and if public policy is that he is going to consider what any locally affected people or groups might have before he will make such a determination. Do you fear, could the state prohibit off-reservation gambling at all or does the federal ? state can take it into ?. I am of the opinion that the state were to pass a law prohibiting off-reservation gambling, that that would run smack into the provisions of the Indian Gaming Regulatory Act that would provide for in certain instances, so I think a state law might have tough time standing up to a constitutional challenge. Are you aware where any state has attempted this at all? No. The only state that has really dealt with the issue to any great extent is the state of Iowa and then in the state of Wisconsin, but the governor there in Wisconsin was the proponent of off-reservation gambling and so the secretary gladly approved because it was not controversial. In Iowa you are talking about across state lines so that is a slightly different situation. Then the (cough) is rather odd

under the Indian Gaming Regulatory Act. It appears that if the Indians or the tribes decide to expand their operations outside the reservation, there is virtually nothing to stop them from plopping a casino down anywhere in the state although it may be contrary to the rules of no casino in that particular state. I think that would be. Let me try to talk practically. I think that would be a worse case of scenario, because in order to plop down that casino, they have got to have that land put into trust or reservation status. It has to be done by the secretary. It does provide for concurrence by the governor, although I talked about that and I think politics, not R and D ? politics, but politics would then play a major role in that and the secretary is going to be hard pressed to approve that if the local community and the governor were opposed. Do you think that the politics is pragmated with the federal act restricted to local communities and what political beliefs may be on a statewide basis ? casino. Does that ?. Well, it depends. If the governor were to concur and the local entity also was favorable and the rest of the state was not favorable, then I think your casino would be approved. What if we, the local community determines it is not detrimental, would the governor probably be persuaded by statewide opinion to determine if it is detrimental then you have the secretary have the right. I am sorry to interrupt you. The secretary could do that. I think that the common thought is that if the governor does not concur and if there is any reason for that nonconcurrence, that the secretary is going to defer, the current secretary, is going to defer to the governor, but that is a subjective analysis and it could change with the personalities of secretaries and governors. Thank you very much. Aren't the other tribes also involved? I mean don't they have an opportunity in off-reservations determinations to ? under veto power. It is my understanding is they could then put ? trick of balancing seems that one could go down town St. Louis and coops, I mean isn't there input from the other tribes as part of this process. In the one example that has occurred in the state of Iowa, that was the deciding factor. A tribe from the state of Nebraska wished to purchased lands in the state of Iowa to operate a casino. During the process as it was submitted to the secretary of interior, the Iowa tribes felt that that would be unfair competition to them. They were opposed to it and the secretary based his decision primarily on that tribal opposition, so, yes, they have a say. Representative Sprague. The current lawsuit the attorney general and the governor have is ? constitutional law, that is a simple question of deciding who has authority to ?. It is my understanding that it is ? at all but the ? state question between our branch and the governor's branch. How is it that a state can determine what its public policy is relative to the types of games that it won't permit its general citizens in which to save time could say be binding on the reservations. Is there a ? for that? Well, right now there is not and that is because of the interpretation given in the Wisconsin case. That is correct and that is the position that the tribal attorneys rightfully take because that is the first court that has looked at that particular decision.

But what that says is that the public policy of a state does not prohibit gambling across the board, then it is not prohibited even though in Wisconsin for example they used the word prohibited the judge said that doesn't mean that in the context of the Indian Gaming Regulatory Act. I have not had a chance to look at the law in the state of Washington, but I heard ? and correct me if very quickly that I believe the constitution has set up a licensing situation ? let go ? two days. That is correct. They have a Washington gambling commission that has statutory authority in which provides for all of those licensing provisions and regulations. Is it correct that Washington in essence is saying that it is a crime to permit gambling activities without first taking some type of license? That is correct. Is that binding upon the tribes at this time and if so is it binding through the compact which were negotiated or is it binding an operation of law? Well, I think there is about two or three answers to that, and I am sorry to do that, but it goes back to what Representative Crable (?) said about the civil regulatory and that clearly makes it a civil regulatory situation. So if that Kapazon analysis works on class three gambling, and there is a question of whether it does or doesn't, then it would not bind the tribes. So what has happened in Washington is those tribes that have entered into compacts have agreed to submit themselves to that nations ? and regulations voluntarily. Those who have not, a couple of them have filed lawsuits against the state and are pending and others are negotiating. Well my question is that obviously there is a ? the Seminole case. I believe the Seminole case spoke to the regulatory vs. the ? status. What does the state have to do to enter into a prohibitory ? in order to regain some jurisdiction in this way? I don't know the answer to that and up until the Wisconsin case a lot of us thought we did know the answer and that is if you pass criminal statutes prohibiting that type of activity, that type of game, you could do it on a game by game basis. Then the state was fine and you didn't have to negotiate for that. Until Wisconsin is cleared up, I would have to say the answer would be, you would have to prohibit every and any form of gambling in the state by any person for any purpose in order to invoke that criminal prohibitory analysis. So if we leave our state as the law as it is right now prohibits some but forgets others, we will be in essence allowing all voters to cast class three to the subject to a compact. To be subject to negotiation for a compact. That's how I understand Kansas law and I know the attorney, I mean I read the attorney general's opinion and I think that is what they say. If so, if we don't take any action then class three is ? in essence ? me. I believe it is yes. o.k. But if we do take some action there may be the possibilities of letting that ? on at least until the Wisconsin decision can determine ? binding on us here. That is correct, but I think that Wisconsin case, in my opinion, is going to go all the way no matter which side prevails at the Seventh Circuit level and then it will be. yeah, I agree, but in the meantime there is no provision for us taking any particular action better defined ?.

You can do that. That is correct in anticipation of a reversal, but if you don't get it then you know it is wide open. But if the reversal does occur and we had to put that into place, we still are in a situation of class three ?. That true. I don't want to confuse things or complicate things, but in the meantime you will have negotiated a compact with tribes or you will have a court imposed ? secretarial imposed compact that is going to provide for certain games and so what happens in Wisconsin eventually is reversed is I can't begin to imagine what an impact that would have. Well, let me suggest this, should a ? would be spoken to at any compact entered into the fact that the Wisconsin case is still out there and perhaps a compact should be approached on at least in part the ? of the Wisconsin case. Absolutely that would be a very critical provision to include in the compact. So that notation should be made in this good contract and should be ? there. I would agree with you. Senator Bond. You have had an opportunity to look at the Kansas compact ? boomerang ? that lists the activities ? gaming activities. I reviewed a couple of the compacts that have been floating around. You said that the activities permitted this compact are the broadest, most liberal, most open treaties that anyone has ever seen. Do you have an opinion? I think that, Senator, comparable to what the state of Washington has done, what the state of Minnesota has done, although Minnesota prohibits craps, I guess was the trade off there, but the state of Washington. The laundry list in the Washington compact and the laundry list in the compact that I have seen from Kansas are similar (side one runs out)

(side two) The Regulatory Commission was created by the Indian Gaming Regulatory Act for the purpose of regulating class two gaming on the reservations. Bingo and bingo related games and to approve management contracts. The Act was passed and signed in 1998. The Commission made up of three individuals, three persons. That Commission was finally constituted in April of 1991. They are in the process now of enacting their operational regulations. They hope to be up and functioning in another year in which they can start to take a look at allegations of wrong doing in class two operation, but what they have just done that is very important to the states is they have issued preliminary regulations. They have not been finalized yet that clearly state what the states have been saying and the tribes have not and that is that slot machines are class three games and if a tribe wants to have a slot machine or video game or any electronic facsimile based equity that they have to enter into a compact with the state. That has been a major bone of contention between the tribes and the states. We can't expect too much from them as far as class three is concerned. They have, under the law, they have no jurisdiction in class three. Thank you. Representative Rock. Thank you. Do any of the current gaming situations that are functional now that you are familiar with. In any of those cases do the states not have concurrent jurisdiction, concurrent criminal jurisdiction with the tribe or the nation? I

believe that in all of the legal class three operations under compact that there is concurrent jurisdiction. I have one more question. I am not making any, unless you are retained by Kansas City, Kansas to make this happen. Ralph, I think I was. You will have to ask them. I was retained initially because they became in the possibility of having some type of development in Kansas City. Their city attorney called me and said that he did not know anything about gambling regulations at all. That he did not know anything about the Indian Gaming Regulatory Act. That they were being told a number of things by a number of people and that they had been referred to our law firm. So I was retained for that purpose and that was the end of November or the middle of November. So it has been a recent relationship. o.k. And I think you said about the same time you were retained you were invited to help us hold this hour. Well, Representative Rock. ? what happened after the last open briefing when we had the attorney general's and the U. S. attorney general's and who was the third party. Oh! the governor's office here. Now, I'll. It was clear to Senator Reilly and me that it might be helpful to have someone nationally who had looked at at looked at these compacts in other states so we made an inquiry at your NCSL and they also came up with Brian McKay, so it came from two sources. That was the name given to us as a helpful person to come in and give us some overview of what was happening in the country. Thanks. I have a question Bryan about again, an issue that has been dealt with (?). Both of our class three (?) terminology (?)-----lottery and parimutual has been initiated due to changes in our constitution in our constitutional amendments in 1986, there has been some discussion of whether or not some statutory revision of those where a constitutional revision would be necessary if people were interested in blocking gaming activities, and again lets put the Wisconsin case aside for a minute, but even assuming that wasn't the law, is it your opinion that given the fact that the people of this state voted to initiate those kind of activities that we would need to change those activities through a constitutional amendment, or is it your opinion that statutory revision would suffice? If indeed it would stand that we could alter that after the fact. I believe in that very nice (?)one of my partners must have written that the Senator read before, it didn't say anything about being a constitutional lawyer, but nonetheless, I think a statute can implement a constitutional provision, but generally speaking a statute cannot reverse or turn around a constitutional provision, so I would think you would have to address it from a constitutional basis, but I defer to experts on the constitution. Representative (?) This is a page in response to Senator Bond's question, you likened our compact laundry list with Washington State. Do they allow (?) betting? I believe they do not. I would have to pull that compact out and look at it. But there are two or three exceptions in it. As I recall sports pool betting is one. I think that's prohibited across the board in the state of Washington. Does any state allow compact allow sports

pool betting? Probably not, because I think the only states that allow for that really to some extent (?) in Nevada, Delaware, and perhaps New Jersey if they get up to speed. I can find that out for you, but I don't specifically know the answer to that question. One more thing. (?) sports pool betting has (?) allowed to bet on high school activities, college activities, sports activities? Sure, sports' pool betting generally means you can bet on the outcome of any game that goes on. Thank you. Representative (?), dear Mr. McKay, on those lines here under Indian Law would be possible on the reservation, I am not from (?) area that sports events such as (?), those types of activities could be carried on. Would it be possible to avail those also under a sports (?). I don't know. It is not uncommon in this country to have bets on that and dog fighting and some other things that people that are generally reprehensible. Folks will bet on anything. I'm from Nevada, and they'll bet on anything. But I again have not thought about that, that has never been raised to me so I don't know. The next question is sporting on a greater local newspaper and both the chairs of our committees have indicated that apparently we will take no action because the Attorney General lawsuit must carry forward. Can you give us an indication of what the impact of that decision is relative to the states position in every (?)compact first in trying to get something going. Number two, as to the state's ability to decide what the policies are of gambling activities. Well, in answer to your first question I think that if you do not conclude a compact within the statutory 180 days because of an ongoing court action, a tribe could sue you for bad faith, but I can't imagine them winning, because the state has negotiated in good faith, and you do have a legitimate question of fundamental constitutional law to be address by the courts. So I think there is a good defense. As to your second question, I just don't know. It would seem to be it would not be helpful if one were to try to negotiate a compact be put in a situation where you cannot say what our public policy is relative to types of gambling. If I negotiate on behalf of the state, it could put it in a very difficult position. Well certainly, yes it would. Certainly if you had a statement of public policy that was enacted by this legislature and signed by the Governor, then you have again a negotiated process and the court is going to review that, I think they are going to look at the record and what has been discussed, and what the state has based some of its determinations or its positions on. So if you have a stated public policy that is more than a series of interpretations of the law, the state stands in a better position, and I feel that very, very strongly. Maybe going back to a question that another one of your members asked, I mean, I think that the Indian Gaming Regulatory Act provides for a strong role in the state. I mean that the act says its the states that know how to regulate gambling, not the Federal Government, not the tribes. So when I sometimes get criticized for being supposedly anti-tribe, its not the case. I just think I was an Attorney General, I spent a year doing that, and I think the states have a meaningful roll in this process, and ought to have. (?) the testimony has been very open and honest and I feel very good about it. I would make an

observation then, if on the (?) of the city of Kansas City you were to enter into negotiations on behalf of the tribe, also with the state of Kansas, you should be in a very good position to be able to obtain (?) what your asking for under current law. I think that would be a fair assumption. In other words, I wish I could negotiate from your position. Mr. McKay, thank you very much and we appreciate your presence, and I think all of the members of the committee are very appreciative of your candor and your openness with the committee, and we realize it is a complicated to say the least (?) (?) your (?) expert testimony we have had here this morning which we have taped and which we will transcribe the first fifteen or so minutes of your opening remarks in which you cited those cases and so make available them available to members of the committee, because they were excellent. We have asked that the Secretary transcribe the opening remarks, not all the questions, but we will retain the tapes and have those available to anyone who would like to listen to them. We appreciate your coming to Kansas, and safe journey home. Thank you very much. Thank you Mr. Chairman and members of the committee.