

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Representative Kathleen Sebelius at
Chairperson

1:30 ~~xxx~~/p.m. on Tuesday, February 11, 1992n room 526-S of the Capitol.

All members were present except:

Representative James Cates - Excused Representative Joan Wagnon - Excused
Representative Joan Hamilton - Excused

Committee staff present:

Mary Galligan, Kansas Legislative Research Department
Lynne Holt, Kansas Legislative Research Department
Connie Craig, Committee Secretary

Conferees appearing before the committee:

Lance Burr, Attorney General, Kickapoo Nation
Ralph Decker, Executive Director, Kansas Lottery

Chair Sebelius announced the public hearing of HCR 5039 will continue today, and Ralph Decker will be at the meeting for questions at the end of the hearings.

Lance Burr, Attorney General for the Kickapoo Nation, appeared before the Committee to testify on HCR 5039. He gave a brief history of the Kickapoo Nation, and how they came to have land in Kansas. Mr. Burr also reported the current status of the Kickapoo Nation. Regarding HCR 5039, Mr. Burr stated this is a lot better approach than trying to do anything legislatively. He felt the Constitution did have to be amended to accomplish Indian casino gambling. He stated that the Kickapoo Nation did not look at this as a moral question, but, instead, the moral question is how to provide health care for Kickapoo Indian children. He gave health care and economic statistics relating to the Kickapoo Indian Tribe. He stressed to the Committee that the Kickapoo's have explored every proposal to try and improve the conditions of the tribe, and that if they cannot get the casino, their next option would be storing toxic waste. Of the jobs produced by Indian casino gambling, Mr. Burr stated that 1,100 would go to non-Indian people, and approximately 300 to 350 jobs to Kickapoo people. He explained that under their proposal, the Kickapoo Indian people would be trained to run the casino in a seven year period of time. He reported that the FBI admitted to him that at this time they do not know of any organized crime involved in Indian gambling. Mr. Burr added that they want to employ people that will make this very respectable and no criminal element. He assured the Committee that Ralph Decker will be on board. Mr. Burr read to the Committee K.S.A. 75-107. He added that Secretary Lujan can only disapprove this Compact for three reasons all dealing with federal statutes, and has nothing to do with how the State signs off on the Compact.

Chair Sebelius asked Mr. Burr for his testimony in writing.

Questions for Mr. Burr:

- You and some of the Tribal Council went to Washington, D.C., and met with the Secretary?
- Is there anything in writing from Secretary Lujan?
- Do you know what is the rational for turning down the Compact, did they define their reasons?
- Did you get any kind of timetable from the Department of Interior in terms of what happens next?
- How was the Attorney General of Kansas approached, and did he say he did not want to be involved?
- Are you familiar with the Federal Court cases, such as the Wisconsin case, that define various aspects of the Indian Gaming Regulatory Act?
- What is your feeling about the State, at this point, changing our laws in order to preclude gaming as an option?

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS

room 526-SStatehouse, at 1:30 ~~xxx~~ p.m. on Tuesday, February 11, 1992.

In response to the last question, Mr. Burr answered the Kickapoo Nation's feeling is why wasn't this done in 1988; why did we wait until the last minute to answer this question.

Questions for Mr. Burr from the Committee:

- Do the Kickapoo Nation consider HCR 5039 to be bad faith?
- If the Kickapoo Nation feels this is bad faith, then will you file a petition on February 25, 1992? Are not the Kickapoo's also saying it is appropriate for the people of the State of Kansas to determine what they feel to be the appropriate forms of gambling throughout the entire state?
- Where did the \$25 million come from to purchase 400 acres?
- What is SODAK?
- Do you also have a management contract with Casino Enterprises?
- What is your position on this type of legislaton, and are you saying no matter what we do today, it's not going to make any difference as to what happens on the Reservation?
- Has the Department of Interior set forth any listed criteria for you to determine whether or not your Compact will be automatically approved?
- Is the Federal law still unclear as to the proposition that if the State permits any gambling, whatsoever, then gambling will be allowed on the Reservation?
- When you talk about a Reservation, is that a prescribed location of land by longitude and latitude?
- If, for instance, the Indians want to have any gambling establishment off the Reservation, then they have got to get permission from the people of the area, is that true?
- Can the Indians by purchase, directly or indirectly, add to their Reservation which is described by longitude and latitude, to take another piece of territory and incorporate it into the Reservation so they do not have to get permission of the local community?
- Can you acquire a piece of property outside of the location of the Reservation?
- Are you unfamiliar with reports of organized criminal activity on Reservations?
- If parimutuel gambling exists, then casino gambling would exist as well and would be negotiable under the Indian Gaming Regulatory Act, is that your interpretation of federal law?
- If we submit HCR 5039 to the people of Kansas, it would be your interpretaiton that this would have no impact on whether the Kickapoo Tribe could enter into a compact permitting casino gambling in Kansas?
- How do you intend to proceed on this issue as to whether or not the Governor has the authority, or are you going to federal court or state court?
- If this compact is not approved, will you view HCR 5039 as a sign of bad faith?
- Where are the Kickapoo's at if the Wisconsin case is overturned?

There was discussion about whether Indian Casino gambling is economic development or not, and whether or not the Legislature should do something in advance of any decision by the Supreme Court.

Chair Sebelius explained she had thought George Wahquahboshkuk, Chairman, Prairie Band of Potawatomi Indians, would be appearing before the Committee today as an opponent, but, unfortunatelly, had not arrived. Chair Sebelius had Chief Wahquahboshkuk's testimony resdistributed to the Committee, Attachment #1.

Chair Sebelius asked Ralph Decker, Kansas Lottery, to explain to the Committee the definitions and different impacts on the current lottery industry that SCR 1632, SB 521, and HCR 5039 would have.

Committee members asked the following questions:

- The Senate version would allow video lottery, but the House version would preclude video lottery?
- In regard to testimony from yesterday about the 1986 Legislative discussion not including casino gambling, and the voters who approved the Lottery in 1986 did not understand the possiblity of casino gambling, and the Attorney General's opinion in 1987 came out with a wide definition of Lottery, which clearly included casino gaming and other issues, Chair Sebelius stated that it had been brought to her attention that Representative Hensley, at that point, introduced HCR 5041 because the original constitutional amendment did not authorize casino gambling. She stated that the issue was raised whether or not the Legislature should redefine the Lottery in 1988 after the Attorney General's opinion, and it was the majority view that it was not necessary or appropriate at that point.
- Which piece of legislation is your preference? Mr. Decker preferred the Senate version.

Chair Sebelius closed the hearing on HCR 5039, and adjourned the meeting.

Prairie Band of Potawatomi Indians

Route 2, Box 50A
MAYETTA, KANSAS 66509
913 966-2255

TESTIMONY OF GEORGE WAHQUAHBOSHKUK, CHAIRMAN

PRAIRIE BAND OF POTAWATOMI INDIANS

BEFORE THE

KANSAS STATE LEGISLATURE

FEBRUARY 10, 1992

Good afternoon. My name is George Wahquahboshkuk and I am the Chairman of the Prairie Band of Potawatomi. On behalf of our Tribal Council and Tribal Members I would like to thank you for this opportunity to present our concerns.

As Chairman of the Potawatomi Tribe one of my paramount duties is and has been to undertake efforts to improve the quality of life for all members of the Potawatomi Tribe. Currently, the Tribe has an unemployment rate in excess of 65%, and the majority of our people have incomes below the poverty line. As you can imagine,

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attachment # 1*

these two facts alone create a multitude of serious social and economic problems. Since taking office, each of the members of our Tribal Council has worked diligently to find solutions to these problems. Toward this end, we have focused our attention on seeking out and implementing programs designed to better educate our children, create jobs for our people and improve our on-reservation economy. Unfortunately, because we have no real tax base, we have been forced to limit our efforts in each of these key areas.

In the early 1980's my tribe, as well as numerous other tribes throughout the United States, began to explore the possibility of creating gaming enterprises to fund many of the programs that neither the federal government nor the state could afford to provide. Recognizing that gaming was a clear avenue for promoting tribal economic development, tribal self-sufficiency and strong tribal government, Congress, in 1988, enacted the Federal Indian Gaming Regulatory Act (IGRA) which authorizes tribes to operate bingo and other similar forms of gaming without state interference, and authorizes states and tribes to enter into compacts to provide for the operation and regulation of more sophisticated forms of gaming.

Under the provisions of the IGRA, tribes are required to implement numerous regulatory protections. For example: all gaming must be operated pursuant to a tribal ordinance approved by the federal government, background checks are required on all key gaming employees, independent audits must be done on all gaming revenue and the

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monies generated from the gaming enterprise must be used to enhance tribal programs and services.

Currently some 23 tribes operate gaming casinos under State/Tribal Compacts. In each case, the tribe involved has seen radical decreases in its unemployment, and substantial increases in the number and quality of the services that it is able to provide to its community. In no instance has Organized Crime or other negative outside influence been found to have infiltrated those games.

A study of those 23 other tribal gaming enterprises will also show that the non-Indian populations living near those reservations have also benefitted from the establishment of those tribal gaming businesses. Restaurants which used to close at 6 p.m. are now open later, hotel occupancy in those areas has increased substantially, and stores and gas stations in the areas are doing a bigger business than ever anticipated. Because unemployment is decreased, welfare dependency is down as more people are able to support their families without federal or state assistance.

The Prairie Band of Potawatomi Indians has spent over three years studying the possibility of seeking a gaming compact with the State of Kansas, and we have concluded that we clearly wish to do so. We have been operating a successful tribal bingo operation for a number of years, and while we have had some minor management

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problems of the type which are typical to all new businesses, we have proven that we have the capability to operate a gaming enterprise in a responsible and prudent manner which protects the interests of the Tribe, the State and the general public.

We are now prepared to present to the State what we believe to be a very reasonable and sound compact proposal. If agreed to, this proposal will create hundreds of jobs both on and off the Reservation, and quadruple the number of dollars we can expend on services to our people.

Since we currently have few stores, lumber yards, automobile dealerships, office supply companies or the like on our Reservation, we will be going off the Reservation to procure these items, greatly increasing the profits of these neighboring businesses. We will also be able to offer more scholarships to our members at Kansas-based Universities, hire more Kansas-based companies to improve our roads, and contract with more Kansas-based businesses for other goods and services. Thus, everyone in our area will benefit, especially, those businesses in and around the Topeka Area.

Unfortunately, we are now the innocent victims of a legal disagreement between the Governor and the Attorney General. We are fully prepared to discuss our proposal at length and negotiate in good faith with whomever the State delegates this authority to. We believe that these negotiations and discussions will alleviate all of the unfounded

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rumors and fears that have been generated about our proposal. Until the State properly designates that person or body, we are all at the mercy of the press, and rumors and half-truths will continue to abound.

The Kansas State Attorney General has interpreted the current provisions of the Kansas Constitution as allowing the State to negotiate a compact with us to operate a casino on our reservation. Unfortunately, false information and the fear of unwanted competition by other gaming interests have led to the introduction of two bills, S. 521 and H.R. 5039, both of which are designed to eliminate the possibility of tribally-owned casino games in the State of Kansas. We strongly oppose both of these bills, as we believe that neither is in the best interest of the Potawatomi Tribe, nor the State of Kansas.

Our country is in a recession and our State Treasury is tighter than it has been in years. Yet, while unemployment is increasing and businesses are closing, our class III gaming compact presents a proposal which will not only create jobs and stimulate the economy in one of the poorest areas of the State, it can also eventually lead to the creation of a number of new and viable non-gaming jobs in Topeka and the surrounding area. Let me ask you, should this opportunity be eliminated simply because some large gaming interests are afraid of competition? All we are asking for is an opportunity to help ourselves and our community. The gaming we are proposing is not against

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community moral standards. If it were, the people of Kansas would never have agreed to a state lottery or to state-licensed horse or dog racing. Please do not be misled into believing that these bill are being presented to protect the public, because they aren't. They are instead being presented to eliminate competition. Let me elaborate just a bit.

EXISTING KANSAS LAW AND PUBLIC POLICY DO NOT PROHIBIT
BROADLY-DEFINED "LOTTERY"

Kansas criminal law and public policy do not prohibit Class III gaming. In fact, the Kansas Constitution expressly authorizes bingo and parimutuel wagering on horse racing. The Kansas Constitution also authorizes the Kansas legislature to provide for a state-owned and operated lottery. Although the constitution does not define the term "lottery," the Kansas Supreme Court has interpreted the term broadly. It has, for example, held that parimutuel wagering on HORSE AND DOG RACING WHICH INCLUDE elements of consideration, chance and price constitutes a lottery. State, ex rel., v. Bissing, 178 Kan. 111, 119(1955). Other decisions have also interpreted the term "lottery" broadly. See, e.g., State, ex rel., v. Mercantile Assn., 45 Kan. 351, 353 (1891) and State, ex rel., v. Fax Kansas Theater Co., 144 Kan. 687, 692 (1936). Although lotteries are specifically authorized by state constitution and statute, the form of playing them is not.

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In a leading federal case defining a state's obligations under the Class III compact negotiations section of the IGRA, Mashantucket Pequot Tribe v. State of Connecticut, 737 F. Supp. 169 (D. Conn. 1990), the Federal Court held that Congress intended the IGRA provisions governing class III to be interpreted consistent with the United States Supreme Court's decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In that case, the Federal Court developed a simple test for determining when a tribe could operate a game of chance on its reservation. That "shorthand test" is "whether the conduct at issue violates the State's public policy." Pequot at 174 (quoting Cabazon at 209).

In Cabazon, the U.S. Supreme Court discussed at length the question of whether California's public policy supports gaming. The Court pointed out that California permits a substantial amount of gaming activity and that it regulates rather than prohibits gaming in general, and bingo in particular. 480 U.S. at 211. Thus the Court held that California regulates rather than prohibits gaming in general and that therefore the Cabazon Tribe's operating of on-reservation gaming did not violate California's public policy. 480 U.S. at 209-12. The IGRA incorporated this same test in 25 U.S.C. 2710 (d)(1)(B) permitting a tribe to enter into a compact to operate Class III gaming activities when such activities are "located in a State that permits such gaming for any purpose by any person, organization or entity" (emphasis added).

In Pequot, the Federal District Court ruled against Connecticut's argument that the meaning of the term "such gaming" in § 2710 (d)(1)(B) should not be interpreted under the Cabazon test, that the test applies only to Class II gaming under §2710 (b)(1)(A). 737 F.Supp. at 174; affirmed 913 F. 2d. 1024 (2nd Cir. 1990); cert denied, 111 S.Ct.668 (1991).

The U.S. Court of Appeals, pointing out that the IGRA's language authorizing Class III gaming compacts is almost identical to the language used to authorize Class II games, held that "the compact process is therefore to be invoked unless, applying the Cabazon test it is determined that the state 'as a matter of criminal law and public policy, prohibit[s] [class III] gaming activity.'" 913 F.2d at 1030.

PROPOSED CHANGES IN KANSAS LAW

DO NOT MAKE BROADLY-DEFINED LOTTERY BY INDIAN TRIBES ILLEGAL

Class III gaming activity is not prohibited by existing Kansas public policy or criminal law. Now the Kansas Legislature proposes two measures, House Concurrent Resolution No. 5039 to amend Section 3c of Article 15 of the Kansas Constitution and Senate Bill No. 521, each of which, if it becomes law, would define lottery in a very limited form. The Senate bill would allow only instant lottery, keno or lotto. The House

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resolution would allow 1) instant lottery games using preprinted tickets; and 2) keno and lottery games, and electronic or computerized versions of those games.

Although both legislative proposals purport to make a wider definition of lottery illegal, i.e., to criminally prohibit certain forms of class III activity, they do not under federal law, including Cabazon, Lac du Flambeau and the IGRA, do so. Because Kansas law specifically authorizes parimutuel wagering on horse and dog racing and specifically authorizes some forms of state-owned lottery, class III gaming is clearly not against Kansas public policy. The new definition of lottery proposed by the legislature is similar to saying that people may drink vodka but may not drink rum.

Even if the legislative proposal to amend the constitution becomes law, it will not change the fact that Kansas public policy is unopposed to sophisticated forms of gaming.

In Lac Du Flambeau Band of Lake Superior Chippewa Indians and the Sokaogon Chippewa Community v. State of Wisconsin, No. 90-C-408-C, (W.D. Wisc. June 18, 1991), the issue between the parties on defendants' motion for summary judgment centered on the provision in § 2710(d)(1)(B) that "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity" The Lac du Flambeau Band proposed casino games, including videogaming machines, roulette, slot

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machines, poker and craps as Class III gaming activities for inclusion in the compact negotiations. Id. at 6. The State took the position that Class III games were prohibited in Wisconsin with the exception of lotteries and on-track parimutuel wagering, that casino games, video games and slot machines were not permitted as required by §2710(d)(1)(B), and refused to negotiate for any Class III games except lotteries and parimutuel wagering. Id. at 7, 11, 16.

The State argued that Congress meant "permit" to be interpreted as "formally or expressly granting leave," and that therefore, unless a state expressly grants leave for playing a particular gaming activity, it cannot be lawful on Indian lands, and the State must bargain only over gaming activities actually operating in the State. Id. at 11.

The federal court held that the State's reading of "permits" ignores other recognized meanings such as "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce by failure to prevent, or to expressly assent or agree to the doing of an act.' Black's Law Dictionary (5th ed.)." Id. But the court also held that more important, the State's reading of "permits" ignored the Cabazon holding, on which Congress relied in drafting the IGRA, that a court must analyze the state's policy toward gambling:

If the policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal-prohibitory and the state's criminal laws apply

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to tribal gaming activity. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation.

Lac du Flambeau at 12 (quoting Cabazon at 211).

As support for the view that Congress did not intend the term "permits such gaming" to limit the tribes to the specific games actually in operation in a state, the court relied upon the congressional findings set out at §2701(5) of IGRA:

Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Lac du Flambeau at 14 (emphasis in original).

The federal court, therefore, concluded that the initial question in determining whether the State "permits" the particular games which the Tribe proposed is not whether the State has given "express approval to the playing of a particular game," but

whether the State's "public policy toward class III gaming is prohibitory or regulatory."

Id. at 14.

Although originally the Wisconsin constitution prohibited all gaming, in 1987 two constitutional amendments authorized a lottery and parimutuel on-track betting. Id. at 14. The court held that the amendments to the State Constitution "evidence a state policy toward gaming that is now regulatory rather than prohibitory in nature." Id. at 16 (citing Cabazon at 211).

The State argued that even if it has a regulatory policy toward Class III activities in general, it need not negotiate the activities proposed by the Tribe because it does not expressly permit the type of gaming the Tribe proposes. Id. at 17. The court held, "It is not necessary for plaintiffs to show that the state formally authorizes the same activities The inquiry is whether Wisconsin prohibits those particular gaming activities. It does not." Id. at 18 (emphasis added).

The federal court held that the State must negotiate the inclusion in a compact of any activity that includes the elements of prize, chance and consideration and is not prohibited expressly by state law. Id. at 20.

CONCLUSION

In conclusion, because tribally-operated casino gaming is not in violation of Kansas public policy, and will benefit both the Potawatomi Tribe and its surrounding area, I am encouraging you to enact as soon as possible, legislation delegating to one person or body the authority to negotiate Class III gaming compacts with all of the tribes in Kansas. In this way, you can insure that the interests of the State are protected, while still allowing us the opportunity to move forward in the way that the U.S. Congress clearly envisioned.

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