Approved MARCH 4, 1992

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

The meeting was called to order by Senator Edward F. Reilly, Jr., at 1:00 p.m. on January 16, 1992 in Room 313-S of the Capitol.

All members were present except:

Committee staff present:

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

Conferees appearing before the committee:

Julene Miller, Deputy Attorney General, Attorney General's Office
Brad Bailey, Assistant United States Attorney, U.S. Attorney's Office for the District of Kansas
Mark Burghart, General Counsel, Dept. of Revenue, State of KS

Others attending: see attached list

Senator Reilly, Co-Chairperson, called the meeting to order and introduced two new senators - Senator Ward and Senator Webb, as well as other staff members. Senator Reilly remarked that the Senate and House had worked together well in the past, and expressed his gratitude for that help and support. He stated that he anticipated the spirit of cooperation will continue and that both the Senate and House needed more information before acting upon the issue being discussed today.

Rep. Sebelius, Co-Chairperson, concurred with Senator Reilly and said it is important that we know what the role of the Legislature is. She introduced a new House member - Rep. Gilbert from Wichita, and stated that we have limited today's discussions to four speakers and another joint committee meeting has been scheduled for next week.

Senator Reilly asked Mary Galligan to brief the committee on the Indian Gaming issue. Mary Galligan discussed Indian Gaming (Attachment 1) with the committee and announced the Governor and the Kickapoo tribe signed the compact today. She then referred to two letters from Senator Reilly to the Attorney General, which resulted in two opinion letters (Attachment 2) from the Attorney General (Opinion Nos. 91-119 and 92-1). A letter from Rep. Graeber addressing the question of location of casinos outside reservations resulted in Opinion No, 91-160. She also referred to another handout (Attachment 3) which may be utilized as a quick reference for differentiating the various classes of gaming and also outlines the number of states involved in gaming activities.

Senator Reilly introduced Julene Miller, who briefed the committee on the Federal Indian Gaming Regulatory Act and how it affects the State of Kansas (Attachment 4). (The Attorney General's three Opinions are a part of Attachment 4).

Rep. Sebelius asked Ms. Miller to clarify if Opinion No. 91-119 states it is necessary to have legislative approval (action) to make the Compact enforceable, amd Ms. Miller answered that the Indian Gaming Regulatory Act does not provide the mechanism for enforcement and that it says the state will negotiate but does not designate which one - the governor or the Legislature - will negotiate. Ms. Miller said that the Attorney General's Opinion is that it takes legislative action to negotiate and enforce the Compact. Rep. Sebelius also asked Ms. Miller for information regarding procedures used by other states, and Ms. Miller explained that it depended upon each states' Constitution and that our state does not specify who will negotiate and ratify such an agreement. Rep. Sebelius requested that Ms. Miller furnish information on other states' gaming regulations.

Rep. Cates said he had received several calls from constituents recently about a casino operating in Northeast Kansas and asked who is responsible for law enforcement since it is illegal, the attorney general or the U.S. Attorney's office? Ms. Miller answered it would probably be a joint obligation to enfore the law by the Attorney General's office and the U.S. Attorney's office since it is an illegal operation.

Several other questions were answered by Ms. Miller regarding definitions of "gaming" and "gambling", classifications of gaming operations and if the Legislature does not extend the lottery and permits the Sunset law to prohibit the lottery, how that will affect other gaming operations. Ms. Miller stated there are very few court decisions at this time to rely on and commented on the Sunset law vs the Constitutional amendment permitting lottery and its affect on casino gambling.

Rep. Sebelius asked if the state does not receive revenue from the gaming operation, if that would be considered negative and not in good faith, and Ms. Miller answered that if the state received no revenue from gaming operations, the Courts could view this as not acting in good faith.

Rep. Sebelius asked Ms. Miller of the consequences if the Legislature takes no action, and Ms. Miller responded that she cannot answer that question, but that the Tribe must have approval of the Compact from the Federal Government to operate. Rep. Sebelius also asked questions regarding who pays the "policing" costs, the Tribe or the state, and Ms. Miller responded that those costs should be paid by the Tribe.

Senator Reilly introduced D. Brad Bailey from the United States Attorney's Office, who delivered a statement (Attachment 5) to the committee on behalf of Lee Thompson.

Questions were asked of Mr. Bailey regarding approval of the Compact by the Department of Interior as well as Compacts which had been approved in other states. Mr. Bailey stated their office does not speculate, but rather deals with facts. He suggested that the Committee communicate with the Department of Interior and that they also request information from the Attorney General's Office to obtain additional data on Compact agreements negotiated by other states. He also stated that the U.S. Attorneys' office and the Justice Department's responsibilities are very different and suggested the Justice Department could provide additional information to the committee.

Several other questions were answered by Mr. Bailey, including Rep. Roy stating it takes longer for the Legislature to act than

the Governor, and if the Legislature were to pass restrictions after the Compact has been signed by the Governor, would the restrictions apply? Mr. Bailey answered that since this is a Regulatory Act, his opinion would be that if the Legislature were to pass restrictions after the Compact has been signed by the Governor, the Compact would have to go back to the Tribes to renegotiate. He stated that the Interior Department may have to settle this question, or the entire procedure may have to start over. Rep. Roy stated the Legislature has a role to play and intends to be part of the process, but that will take time. He asked Mr. Bailey if he was aware of Compacts developed without the Legislature, and Mr. Bailey answered he was not aware of any.

Senator Reilly introduced Mark Burghart, General Counsel for the Department of Revenue, who briefed the committee on pertinent information on the gaming issue. (Note: Mr. Burghart did not submit written testimony.) He also announced that the Governor had signed the Compact with the Kickapoo tribe earlier today. Mr. Burghart continued by pointing out items not in the Compact and precautions that were taken to eliminate problems. He stated it is the Governor's desire to have a good Compact. He stated the Tribe has offered to make a contribution to the state revenue (Federal law prohibits the State to tax revenue from gaming) and told what those contributions would be. He stated there is a mechanism for amendments in the Compact as new problems are addressed and also an arbitration provision.

Senator Reilly asked Mr. Burghart if other states were used as models in formulating the Compact, and Mr. Burghart answered they had reviewed 25 or more, and this was the best they could find. He stated Nevada is the only state which makes a contribution to state revenue from gaming proceeds. Senator Reilly asked if they would negotiate with other tribes, and Mr. Burghart stated there are four recognized Nations in Kansas and that they would negotiate in good faith with them; two other tribes have made written, formal requests.

Senator Reilly asked how they addressed the issue of the conflict between the Attorney General and the Governor. Mr. Burghart asnwered that the Governor is the chief executive officer of the state and is given the power to negotiate all types of contracts on behalf of the state. Senator Reilly asked if the Constitution grants the power to negotiate such a Compact to the Governor; does the Constitution grant that power to the Legislature? Mr. Burghart answered that the federal law is quiet on who signs on behalf of the state; that on Compacts negotiated in other states, the Governor has signed on behalf of the state.

Rep. Sebelius asked Mr. Burghart if he was aware of enabling legislation that states the Governor must sign the Compact and what is the law in other states? What specific role does the Legislature play in the process? Mr. Burghart answered that the Governor appointed state officials to negotiate the Compact and that other states have followed the same process; the Compact must be negotiated in 180 days, otherwise the state has shown bad faith in the negotiation process. Rep. Sebelius again requested from Ms. Miller information on the gaming issue from other states.

Senator Bond asked Mr. Burghart specific elements relating to the Compact, and he replied that the Compact is an on-going process subject to amendment and that the Compact is not finalized until it is signed by the Secretary of the Interior. Senator Bond then asked the location of the Compact at the present time; has it

been sent to Washington? Mr. Burghart replied that it was in Bill McCormick's (Governor's) office. Senator Bond continued by questioning Mr. Burghart on various tax issues, and Senator Webb questioned if the parties involved in the negotiations had researched economic impact to the state.

At that point, Senators left the meeting, as the Senate was called to order, and House members continued with questions.

Rep. Sebelius recognized House members for additional questions.

Rep. Lane questioned what type of management company will oversee operation of the casinos and whether there would be investors as stockholders. Mr. Burghart stated they will be controlled by an Indian Gaming Regulatory Commission, and the Compact had been drafted in accordance with the law.

Rep. Rock raised questions regarding criminal jurisdiction and who would police and control casinos and pointed out a conflict of interest which could develop if the Lottery office controlled the casinos. Rep. Ramirez asked if the Compact has been signed by the Governor, if that makes the state liable? Mr. Burghart responded that the state cannot be held liable, unless our own people cause the problem.

Rep. Roy asked for clarification on the number of days allowed to the state to negotiate in good faith, and Mr. Burghart answered that we have to be negotiating within 180 days. Rep. Roy went on to state that all parties are not included in the Compact, and the Governor is not the state. Since we have a multi-branch government - equal branches - he expressed concern that when the Legislature comes to an agreement on this issue, where will that leave the terms of the Compact?

Rep. Douville asked if the Compact provided on-reservation gambling only, and Mr. Burghart answered there is an approval provision in the Compact relating to off-reservation gambling.
Rep. Roy commented that the Governor does not have authority to sign the Compact, unless specifically authorized by the Legislature; that the Governor may act as constitutionally prescribed or with authority specifically delegated by the Legislature.

Meeting adjourned at 2:45.

GUEST LIST

FEDERAL & STATE AFFAIRS COMMITTEE

DATE January 16, 1992

(PLEASE PRINT)

NAME	ADDRESS	WHO YOU REPRESENT
Richard Taylor	Topeka	Life at its Best
Brad Bailey	Topeka	US Attorney's Office
Julene Miller	Topeka	A.G.'s office
Linda Saunders	Horton KS	Bureau of Indian Affairs
Brenda Shadwick	" "	"
Patrick J. Hurley	Hoch ans	McGill & Associates
Whitney Damron	Topeka, KS	Pete McGill & Assoc.
Carol McDowell	Topeka	
John C. Bottenberg	Topeka	VLC
Sharon Huffman	Topeka	KS Commission on Disability Concerns
Pat Hubbell	Topeka	Pat Hubbell Assoc. Inc.
Janet A. Chubb	Topeka	racing commission
Barb Reinert	"	LWV Voters
Charlene Wilson	Topeka	United Meth Church
Bob Sherburne	Topeka	Topeka Now Inc
Art Brown	K.C.Mo	KS. CBR Dealers
Julie Weir	Topeka	Hein, Short & Rose
Tom Fraser	Top	
John N. Roberts	Topeka	Kansas Lottery
Derieth L. Sutton	Topeka, KS	Kansas Lottery
Ralph Decker	Topeka, Ks.	Kansas Lottery
DANA NELSON	TOPEKA	KANSAS RACING COMMISSION
Nick Roach	Topeka	Self
[illegible]	Stafford	Rep
[illegible]	Topeka	KBI
Jeff Deep	Manhattan	Intern

GUEST LIST

FEDERAL & STATE AFFAIRS COMMITTEE

DATE January 16, 1991

(PLEASE PRINT) NAME	ADDRESS	WHO YOU REPRESENT
Todd Knappenberger	Olathe KS	Sen. Webb
Jim Edwards	Topeka	KCCI

ATTACH

MEMORANDUM

Kansas Legislative Research Department

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

January 17, 1992

To: House and Senate Committees on Federal and State Affairs

Re: Indian Gaming

Kansas became involved with Indian gaming as a result of receipt of a formal request from the Kickapoo tribe to begin negotiation of a compact as required under the federal Indian Gaming Regulatory Act (25 U.S.C. Sec. 2651) (IGRA). That request arrived on August 28, 1991. Under the federal Act, the state and the tribe have 180 days during which to negotiate a compact. That period will expire on February 28. The Governor and the tribe signed the compact today. the compact will be submitted to the Department of Interior for approval as required by the IGRA.

On November 27,1991, the Pottawatomie tribe also submitted a formal request to begin negotiation of a compact under the IGRA. Mr. McCormick characterized discussion with that tribe as very preliminary at this point. He said his understanding was that the tribe would work to adopt a tribal ordinance prior to beginning detailed discussions with the state. The 180-day period for negotiation of this compact will expire in May.

There have been reports in newspapers that the Sac and Fox Tribe intends to establish a casino, but the state has not yet received a formal request to begin negotiations from that tribe. Representatives of the Iowa Indians have been quoted as saying the tribe is not currently interested in becoming involved in gambling.

Beginning last fall, Senator Reilly posed a number of questions about the IGRA to the Attorney General. Those questions have been addressed in two opinion letters, 91-119 and 92-1. The Attorney General has issued a third opinion on the topic that addresses the question of location of casinos outside reservations posed by Representative Graeber (91-160). Copies of Senator Reilly's letters to the Attorney General are attached for the Committees' review.

92-0032/mkg

S F&SA
1/16/92
Att 1
1 of 1

STATE OF KANSAS

EDWARD F. REILLY, JR.
SENATOR, THIRD DISTRICT
LEAVENWORTH AND JEFFERSON COUNTIES
430 DELAWARE
LEAVENWORTH, KANSAS 66048-2733
913/682-1236

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
CHAIRMAN: FEDERAL AND STATE AFFAIRS AND INSURANCE SUBCOMMITTEE
VICE CHAIRMAN: ELECTIONS
MEMBER: CONFIRMATIONS
FINANCIAL INSTITUTIONS AND INSURANCE
PUBLIC HEALTH AND WELFARE

September 13, 1991

Honorable Robert T. Stephan, Attorney General
Judicial Center
301 Southwest 10th, 2nd Floor
Topeka, Kansas 66612-1597

Dear Attorney General Stephan:

Reports of recent discussions between the Governor and officials of American Indian tribes in Kansas regarding establishment of gambling facilities on tribal lands raise a number of questions about which I would appreciate your opinion. Those 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?

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?

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?

In addition to your responses to those specific questions, I would appreciate other information useful to the Legislature in light of the possibility that class III gaming may be established in the State. I will appreciate your prompt attention to this request. If you have any questions, please feel free to call.

Sincerely,

Senator Edward F. Reilly, Jr., Chair
Senate Federal and State Affairs Committee

Att 2
Pg. 1

STATE OF KANSAS

EDWARD F. REILLY, JR.
SENATOR, THIRD DISTRICT
LEAVENWORTH AND JEFFERSON COUNTIES
430 DELAWARE
LEAVENWORTH, KANSAS 66048-2733
913/682 1236

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
CHAIRMAN FEDERAL AND STATE AFFAIRS AND INSURANCE SUBCOMMITTEE
VICE CHAIRMAN ELECTIONS
MEMBER CONFIRMATIONS
FINANCIAL INSTITUTIONS AND INSURANCE
PUBLIC HEALTH AND WELFARE

October 30, 1991

Mr. Robert Stephan, Attorney General
State of Kansas
Judicial Center
Topeka, Kansas 66612

Dear General Stephan:

In preparation for the 1992 Session, a number of questions have arisen regarding gambling permitted under the *Kansas Constitution*. I will appreciate your responses to the following questions:

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?

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?*

In the absence of a law permitting simulcasting in Kansas, could American Indian gambling establishments receive simulcast race signals from tracks outside the state, whether or not betting is allowed on those simulcast races?

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?

Att. 2
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What types of arrangements with regard to video lottery machines would 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?

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?

I appreciate your assistance with these matters. Please feel free to call if you have any questions.

Sincerely,

Senator Edward F. Reilly, Jr.
Third District

Attach. 3

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

September 30, 1991

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.

* * *

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

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

> "(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

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).

Att. 2
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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.

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).

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

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

RTS:JLM:jm

Att. 2

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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December 19, 1991

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.

* * *

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

> "(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:

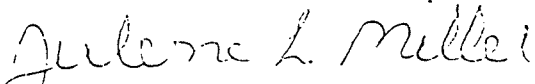
> "Gaming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination." S.Rep.No. 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

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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ROBERT T. STEPHAN
ATTORNEY GENERAL

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).

* * *

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

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.

"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.

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

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

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Att. 2
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States and Indian Gaming

The federal Indian Gaming Regulatory Act of 1988 is the controlling law with regard to the states' role in the area of Indian gaming. Among goals stated in the act are tribal economic development, self-sufficiency, and strong tribal governments. The act also aims to shield tribes from organized crime and assure fair play, as well as protecting gaming as a means of generating tribal revenue. According to the act:

1. Class I (ceremonial) gaming is under the tribes' jurisdiction.

2. Class II gaming (bingo, lotto, pull tabs, tip jars, and non-banking card games) remains under extensive tribal jurisdiction, but is subject to oversight regulation by the National Indian Gaming Commission. State law is applicable to determine whether Class II gaming is allowed at all--that is, an Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction only if such Indian gaming is located within a state that permits such gaming for any purpose, by any person, organization or entity.

3. Class III gaming (all gaming that is not Class I or Class II, including banking cards, slot machines, horse and dog racing, parimutuel wagering, and jai alai) is prohibited to tribes unless they enter into a tribal-state compact for the operation of such games. These compacts allow the possibility that the state will be able to negotiate substantial jurisdiction and influence with regard to a tribally-owned Class III enterprise.

Points to Consider:

- Indian tribes can engage in any gaming allowed by the state in which their lands are located, and these games may be played for higher stakes than are authorized off the reservations.

- Gaming is considered by the federal government to be a legitimate form of economic development for tribes. Tribal bingo and other games have attracted large numbers of non-Indians and gaming has become a significant money-raiser for many tribes.

- Tribes planning to engage in Class III gaming activities must initiate development of a tribal-state gaming compact by requesting negotiations with the state.

- The state in turn must begin good-faith negotiations with the tribe within 180 days of receipt of the request for negotiation. If the compact is not completed within the 180 day period, the tribe could take action against the state in court.
- There are at least 15 tribal-state gaming compacts in place in 5 states. Minnesota has 8 of those compacts. The other states are California, Nebraska, Nevada, and South Dakota.

- Additional states are in the process of developing compacts: Colorado, Iowa, Washington, and perhaps Michigan and Wisconsin. Connecticut and the Pequot Tribe were unable to agree on a compact; the Interior Secretary approved the Pequot plan that had been rejected by the state. The Pequots will soon open a casino over the objections of many state officials including the governor.

- There is little solid evidence of organized crime involvement in Indian gaming, although there have been recent reports of that possibility in Minnesota, New York, and California.

- The primary objection to tribal gaming activities has been moral: tribes should not be able to circumvent the moral standards of non-Indian society that led to the prohibition of gambling for high stakes in most states.

For further information, contact the National Conference of State Legislatures at 303/830-2200.

August, 1991

States and Indian Gaming

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- Gaming is considered by the federal government to be a legitimate form of economic development for tribes. Tribal bingo and other games have attracted large numbers of non-Indians and gaming has become a significant money-raiser for many tribes.

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August, 1991

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1. Class I (ceremonial) gaming is under the tribes' jurisdiction.

2. Class II gaming (bingo, lotto, pull tabs, tip jars, and non-banking card games) remains under extensive tribal jurisdiction, but is subject to oversight regulation by the National Indian Gaming Commission. State law is applicable to determine whether Class II gaming is allowed at all--that is, an Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction only if such Indian gaming is located within a state that permits such gaming for any purpose, by any person, organization or entity.

3. Class III gaming (all gaming that is not Class I or Class II, including banking cards, slot machines, horse and dog racing, parimutuel wagering, and jai alai) is prohibited to tribes unless they enter into a tribal-state compact for the operation of such games. These compacts allow the possibility that the state will be able to negotiate substantial jurisdiction and influence with regard to a tribally-owned Class III enterprise.

Points to Consider:

- Indian tribes can engage in any gaming allowed by the state in which their lands are located, and these games may be played for higher stakes than are authorized off the reservations.

- Gaming is considered by the federal government to be a legitimate form of economic development for tribes. Tribal bingo and other games have attracted large numbers of non-Indians and gaming has become a significant money-raiser for many tribes.

- Tribes planning to engage in Class III gaming activities must initiate development of a tribal-state gaming compact by requesting negotiations with the state.

- The state in turn must begin good-faith negotiations with the tribe within 180 days of receipt of the request for negotiation. If the compact is not completed within the 180 day period, the tribe could take action against the state in court.
- There are at least 15 tribal-state gaming compacts in place in 5 states. Minnesota has 8 of those compacts. The other states are California, Nebraska, Nevada, and South Dakota.

- Additional states are in the process of developing compacts: Colorado, Iowa, Washington, and perhaps Michigan and Wisconsin. Connecticut and the Pequot Tribe were unable to agree on a compact; the Interior Secretary approved the Pequot plan that had been rejected by the state. The Pequots will soon open a casino over the objections of many state officials including the governor.

- There is little solid evidence of organized crime involvement in Indian gaming, although there have been recent reports of that possibility in Minnesota, New York, and California.

- The primary objection to tribal gaming activities has been moral: tribes should not be able to circumvent the moral standards of non-Indian society that led to the prohibition of gambling for high stakes in most states.

For further information, contact the National Conference of State Legislatures at 303/830-2200.

August, 1991

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Attach. 4

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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Testimony of Julene L. Miller
Deputy Attorney General
Before the Joint Federal and
State Affairs Committee
Indian Gaming Regulatory Act
January 16, 199

Mr. Chairman, Members of the Committee:

We have been asked to brief you on the federal Indian gaming regulatory act and how it affects the state of Kansas.

The Indian gaming regulatory act has two primary purposes: to foster gaming as a means of economic development available to Indian tribes in their efforts to be self-sufficient; and to create a mechanism whereby states may play a role in regulating certain gaming activities on the reservations. 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 celebrations." Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribe and is not subject to the act. Class

II gaming is essentially bingo and non-banking card games. Class II gaming on Indian lands is also within the jurisdiction of the Indian tribe, but subject to the act and is regulated in part by the national Indian gaming commission. Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." Class III gaming generally includes slot machines, casino games including banking card games, horse and dog racing, pari-mutuel, jai alai, and so forth. Class III games may be operated on Indian lands in states that permit such gaming activities by any entity and are to be regulated pursuant to a tribal-state compact. It is class III gaming which has been the focus of the opinions Attorney General Stephan has been requested to issue.

In Attorney General Opinion No. 91-119 the Attorney General concluded that since the state itself is permitted to conduct any game involving the elements of consideration, chance and prize, any game including these three elements may be negotiated for inclusion in a tribal-state compact. However, as discussed in Attorney General Opinion No. 92-1, if the legislature were to prohibit certain games across the board (meaning no one, including the state, may conduct or participate in those games) then those games would no longer be permissible subjects for inclusion in a compact.

Attorney General Opinion No. 91-119 also discusses the permissible contents of a tribal-state compact. The compact may provide for: the application of state criminal and civil laws or tribal ordinances to the operation; state or tribal enforcement of such laws; an agreement for the tribe to reimburse the state for costs of regulating the operation; standards for the operation, including licensing; and any other subjects that are directly related to the operation of gaming activities. The state may not tax a tribe's class III gaming operations.

Finally, Attorney General Opinion No. 91-119 states General Stephan's belief that some legislative action is necessary to render gaming compacts binding and enforceable against the state. The legislature may either ratify compacts presented to it, or specifically authorize the governor to formulate and execute the compacts. If the legislature fails to take any action to further the progress of the compacts, the state may be subject to provisions of the act which authorize tribes to proceed to federal court seeking an order to conclude negotiations within 60 days, after which time a mediator chooses which compact proposal (the state's or the tribe's) should be used.

One other opinion, No. 91-160, addresses the ability of a tribe to locate a gaming operation on land outside its

currently recognized reservation boundaries. The Indian gaming regulatory act specifically provides for this if the land is acquired by the secretary of the interior in trust for the tribe, and if, after having consulted with state and local officials, the secretary and the governor determine that locating a gaming establishment on such lands would be in the best interests of the tribe and not detrimental to the community surrounding the proposed site.

STATE OF KANSAS

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September 30, 1991

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.

* * *

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

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

> "(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

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).

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.

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).

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

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

RTS:JLM:jm

Att. 4
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STATE OF KANSAS

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December 19, 1991

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.

* * *

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

> "(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:

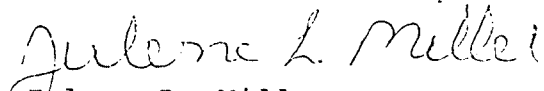
> "Gaming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination." S.Rep.No. 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

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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

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

* * *

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

Att. 4
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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

> 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.

"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.

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

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January 16, 1992

OUTLINE OF STATEMENT ON BEHALF
OF LEE THOMPSON, UNITED STATES ATTORNEY
FOR THE DISTRICT OF KANSAS,
BY D. BRAD BAILEY, ASSISTANT UNITED STATES ATTORNEY

Lee Thompson the United States Attorney for the District of Kansas appreciates the legislature's invitation to attend today's meeting on Indian gaming. But for prior commitments, Mr. Thompson would have appeared personally. Being unable to attend, Mr. Thompson has asked that I convey a few of his thoughts on the issue of Indian gaming.

All comments from the United States Attorney's office should be prefaced by the statement that we are lawyers and prosecutors. Our job is to interpret laws and prosecute violations of those laws. We do not make the policy judgements that influence legislation.

With that caveat, there are a few points the United States Attorney feels merit your consideration. They are as follows:

1. Gambling is not just an economic development issue but a crime issue and the federal government has a compelling interest in assuring that criminal laws are not violated.

2. In Kansas the state and federal government have concurrent jurisdiction over criminal offenses committed by or against Indians on Indian reservations.

3. Class III gaming on Indian reservations is subject to federal and state oversight and is legal only if approved by the United States Department of Interior and conducted in conformance with a tribal-state compact.

4. Unless and until a tribal-state compact is executed and approved by the Department of Interior, the United States Attorney's office will diligently enforce criminal laws prohibiting class III gaming on Indian reservations.

5. The United States Attorney for the District of Kansas in concerned about tribal-state compacts which permit Indian tribes to conduct games that are not specifically authorized by state law. It has been suggested that if a state permits any type of gambling, class III gambling on Indian reservations may be lawful. Whether the state has to prohibit all forms of gambling in order to prohibit class III gambling on Indian reservations is a complicated issue that has not been conclusively resolved in the Tenth Circuit.

6. The United States Attorney for the District of Kansas is also concerned about the expansion and creation of Indian reservations and lands held in trust for the benefit of Indians for the purpose of building casinos. The recent proposal to build a casino near Kansas City has brought this issue to light in Kansas. This is also an area that is subject to federal oversight. New reservations cannot be created without the approval of the Department of Interior. Without explicit approval from the Department of Interior, attempts to sponsor gambling activities off the reservation would be illegal and prosecuted by this office.

7. The United States Attorney for the District of Kansas has taken an active role in forming national policy concerning the Indian gaming issue within the Department of Justice and intends to participate in future meetings of the United States Attorney's subcommittee on Indian affairs.