



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 221

Alan F. Alderson
General Counsel
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State Office Building
Topeka, Kansas 66625

Re: Crimes and Punishments--Crimes Against the
Public Morals--Illegal Bingo Operation

Synopsis: The provisions of K.S.A. 79-4701 et seq., and amendments thereto, which provide for the licensing, regulation and taxing of bingo games conducted by certain bona fide nonprofit organizations, may not be enforced against Indians conducting bingo games upon Indian reservations within the territorial boundaries of the state of Kansas. However, other state gambling statutes, which restrict gambling activities other than games of bingo, may be enforced upon Indian reservations. Cited herein: K.S.A. 21-4302, 21-4303, 21-4303a, 21-4304, 79-4701, 79-4702, 79-4703, 79-4704, K.S.A. 1981 Supp. 79-4705, 79-4706, K.S.A. 79-4708, L. 1982, ch. 425, §§1-3, Kan. Const., Art. 15, §§3, 3a, 18 U.S.C. §1162, 18 U.S.C. §3243, 28 U.S.C. §1360.

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Dear Mr. Alderson:

You request our opinion as to whether the provisions of K.S.A. 79-4701 et seq., and amendments thereto, hereinafter referred to as "the bingo act," apply on Indian reservations located in

the state of Kansas. Said act provides for the regulation, licensing and taxing of games of bingo, and your questions concerning the same are as follows:

- "(1) Does the Bingo Tax Act, K.S.A. 79-4701 et seq., as amended, apply in its entirety, to games conducted on Indian reservations?
- "(2) If not, do any of the provisions of the Bingo Tax Act apply and, if so, which ones?
- "(3) Can we validly collect the enforcement tax under provisions of the Act if the regulatory provisions of the Act do not apply?
- "(4) Can we validly contract with the Tribal Councils of the respective tribes for purposes of obtaining 6% of the gross proceeds generated by bingo if the enforcement provisions and regulatory provisions of the Act do not apply?
- "(5) Can this department enforce the provisions of the Act as to non-Indians playing on the reservations?
- "(6) Would the use of 'pull tabs' be illegal?"

In order to construe the provisions of the bingo act, and determine whether such provisions are applicable on Indian reservations, it is necessary to consider the history of said act and state laws relating to gambling and lotteries.

Prior to 1974, the operation of all forms of lotteries (including bingo) was expressly prohibited under the provisions of Article 15, Section 3 of the Kansas Constitution. State, ex rel., v. Kalb, 218 Kan. 459, 465 (1975). In 1974, the Kansas Constitution was amended to permit the playing of bingo by certain specified organizations, as follows:

"Notwithstanding the provisions of section 3 of article 15 of the constitution of the state of Kansas the legislature may 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."
Kan. Const., Art. 15, §3a.

Pursuant to authority granted by this amendment, the Kansas Legislature enacted K.S.A. 79-4701 et seq., providing for the licensing, regulation and taxing of bingo games conducted by

bona fide nonprofit religious, charitable, fraternal, educational and veterans' organizations. The bingo act defines the types of organizations which are eligible for a license [K.S.A. 79-4701 (as amended by L. 1982, ch. 425, §1)] and prescribes procedures for applying for licenses. [K.S.A. 79-4703 (as amended by L. 1982, ch. 425, §2).] A license application fee in the amount of \$25 is imposed [K.S.A. 79-4703 (as amended)], and a tax at the rate of 3% of the gross receipts received is levied upon (and must be collected and paid by) licensees (K.S.A. 79-4704). K.S.A. 1981 Supp. 79-4705 provides for the filing of returns and payment of taxes by licensed organizations, and K.S.A. 1981 Supp. 79-4706 (as amended by L. 1982, ch. 425, §3) prescribes numerous restrictions relating to the management, operation and conduct of bingo games by said organizations. Said restrictions include limitations upon the aggregate value of prizes awarded or offered in any single day [subsection (b)], number of games conducted per day [subsection (g)], amount of prizes awarded for each game [subsection (h)], amounts charged for bingo cards [subsection (i)], and number of calendar days per week upon which bingo games may be conducted [subsection (j)]. Additionally, K.S.A. 79-4702 provides that "the power to regulate, license and tax the management, operation and conduct of and participation in games of bingo is hereby vested exclusively in the state," and K.S.A. 79-4708 stipulates that the secretary of revenue shall administer the provisions of the bingo act and adopt and enforce rules and regulations relative thereto.

The Kansas Criminal Code prescribes penalties for entering or remaining in a gambling place with an intent to participate in a lottery (K.S.A. 21-4303), and for conducting a lottery [K.S.A. 21-4304(d)]. The term "lottery" is defined in subsections (2) and (3) of K.S.A. 21-4302, as follows:

"(2) A 'lottery' is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance.

"(3) 'Consideration' as used in this section means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant.

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

"As used in this subsection, the term 'consideration' shall not include sums of money paid by or for participants in any bingo game managed, operated, or conducted in accordance with the laws of the state of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate, or conduct bingo games under the laws of the state of Kansas and it shall be conclusively presumed that such sums paid by or for said participants were intended by said participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations, as set forth in the appropriate paragraphs of subsection (c) or in subsection (d) of section 501 of the internal revenue code of 1954, as amended, and as set forth in K.S.A. 79-4701." (Emphasis added.)

K.S.A. 21-4303a prohibits illegal bingo operations, and provides as follows:

"(1) Illegal bingo operation is the management, operation or conduct of games of bingo in violation of the laws of the state of Kansas pertaining to the regulation, licensing and taxing of games of bingo or rules and regulations adopted pursuant thereto. Illegal bingo operation is a class A misdemeanor.

"(2) This section shall be a part of and supplemental to the Kansas criminal code."

The last-cited statutes are part of the Kansas Criminal Code, and the Kansas Supreme Court has recently held that the state of Kansas has jurisdiction, pursuant to 18 U.S.C. §3243, over offenses committed by or against Indians on Indian reservations, except as to certain major offenses (not including violation of gambling laws). See State v. Mitchell, 231 Kan. 144 (1982). On first glance, one might conclude that the decision in the Mitchell case is dispositive of the questions which have been posed. However, in order to determine whether penal provisions related to violation of state bingo laws apply on Indian reservations, it is necessary to consider two recent cases from other jurisdictions.

In Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Circuit, 1981; U.S. cert. denied, 102 S.C. 1717) the Fifth Circuit

Court of Appeals considered the application of Florida bingo laws upon the Seminole Indian Reservation. The state of Florida had assumed criminal jurisdiction over reservation Indians pursuant to Section 7 of former Public Law 83-280 (commonly referred to as Public Law 280), 67 Stat. 588, 590 (1953) [repealed by Pub.L. 90-284, Title IV, §403, 82 Stat. 79 (1968)] and the state contended that the penal provisions provided for violation of its bingo law were enforceable upon the Indian reservation. The court, citing Bryan v. Itasca County, 426 U.S. 373 (1976), concluded that the assumption of jurisdiction under Public Law 280 did not give the state general civil regulatory power over reservation Indians, and stated that the question which the case turned upon was whether the bingo law represented an exercise of the state's regulatory (civil) or prohibitory (criminal) authority. After stating that a state's public policy determines whether an activity is prohibited or regulated, the court concluded as follows:

"Although the Florida Constitution, the Florida Supreme Court, and the Florida legislature have in various forms denounced the 'evils of gambling,' it is clear from the provisions of the bingo statute in question and the statutory scheme of the Florida gambling provisions considered as a whole that the playing of bingo and operation of bingo halls is not contrary to the public policy of the state. Other courts prohibiting other forms of gambling have found those forms of gambling contrary to the public policy of the state." (Emphasis added.) 658 F.2d at 316.

In Butterworth, the state had also petitioned the court for a ruling that, even if the Florida bingo statute could not be enforced against the Seminole Indian Tribe, the Indians must distinguish between Indians and non-Indians and abide by the restrictions of the bingo statute as to non-Indians. The court rejected said petition, stating as follows:

"[W]e note that the statute in question, Fla.Stat. §849.093, makes no reference to violations of its restrictions by the players of bingo. Sheriff Butterworth suggests that several general lottery prohibition statutes, such as Fla.Stat. §§849.08, 849.09(1)(b), and 849.09(2), permit the arrest of bingo players as players of illegal lotteries; however, we refuse to recognize in one breath that bingo is excluded from the general lottery prohibition and in the next permit the arrest of bingo players as players of illegal lotteries.

The statutes cited must be considered in pari materia with the bingo statute permitting the operation of bingo games. The bingo statute does not prohibit the playing of bingo games in violation of its restrictions, and if the legislature of the state of Florida desires to prohibit such, then it must act accordingly. The courts that have prohibited Indians or non-Indians from gambling on reservations have done so in light of a statute that specifically prohibits the act of gambling." (Emphasis by court.) 658 F.2d at 316.

The second case which concerns the application of state bingo laws upon an Indian reservation is Oneida Tribe of Indians of Wis. v. State of Wisconsin, 518 F.Supp. 712 (1981). In said case, the Oneida Tribe sought a declaratory judgment that Wisconsin statutes, relating to bingo operations, could not be enforced on the Indian reservation. The case came before the court on the state's motion to dismiss.

The court noted that the state had acquired limited civil (adjudicatory) and general criminal jurisdiction upon Indian reservations by virtue of Public Law 280, 18 U.S.C. §1162, 28 U.S.C. §1360, and determined that the applicability of the bingo law on the Oneida Reservation depended upon whether said law was criminal-prohibitory or civil-regulatory. The court described the history of Wisconsin constitutional and statutory provisions relating to bingo, as follows:

"Prior to 1973, the Wisconsin constitution and Wisconsin statutes forbade the conduct of any lottery, including bingo. In 1973, the state's constitution was amended and now provides:

"The legislature shall never authorize any lottery, or grant any divorce.

"(1) The legislature may authorize bingo games licensed by the state, and operated by religious, charitable, service, fraternal or veterans' organizations or those to which contributions are deductible for federal or state income tax purposes. All profits must inure to the licensed organization and no salaries, fees or profits shall be paid to any other organization or person.

"Wis.Const., Art. IV, §24.

"Pursuant to this change in the state's constitution, the Wisconsin legislature enacted Wis.Stats. Chapter 163, which governs the conduct of bingo in the state, and amended Wis.Stat. §945.01, pertaining to definitions relating to gambling, to provide: '"Lottery" does not include bingo or a raffle as defined in s. 163.03 if conducted under ch. 163.' Wis.Stat. §945.01(2)am)." 518 F.Supp. at 717.

The state of Wisconsin urged the court to adopt the following construction of the state bingo laws:

"When chs. 945 and 163 Stats., and Wisconsin Constitution art. IV, sec. 24 are considered together, it is clear that the laws applicable to persons engaged in unlicensed bingo are primarily criminal rather than civil regulatory. It is only after an entity applies for and is granted a state license to conduct bingo that the regulatory provisions of ch. 163 become effective . . . [S]ince, under the Wisconsin statutory scheme, the state laws being applied are primarily criminal in nature, the state does have authorization under Public Law 280 to enforce those statutes against unauthorized bingo activities conducted by Oneida Tribe members on the Oneida Reservation." 518 F.Supp. at 717.

The court in Oneida rejected the state's position, stating as follows:

"As noted earlier, defendants attempt to demonstrate that Wisconsin's bingo laws are prohibitory because only those organizations defined in the constitution and statutes of the state are allowed to conduct bingo games, and only under regulated circumstances. Defendants' argument misses one important point: the general populace of the state of Wisconsin is allowed to play bingo. Moreover, the state law governing bingo appears to provide penalties for those who illegally conduct bingo games rather than for those who merely play in such games. See e.g., Wis.Stat. §163.54. Thus, because it

appears that Wisconsin's bingo laws are not designed to prohibit the general populace from playing bingo, it seems that those laws are regulatory rather than prohibitory, at least under the analysis employed by the court in United States v. Marcyes.

. . . .

"I conclude that when Congress conferred jurisdiction on the State of Wisconsin to enforce its criminal laws on the Oneida Reservation, Congress intended to limit the exercise of that jurisdiction to enforcement of laws generally prohibiting activities that the state determined are too dangerous, unhealthy, or otherwise detrimental to the well-being of the state's citizens. I conclude also that Congress did not intend to allow states to use licensing requirements in an attempt to create jurisdiction to enforce otherwise civil regulations on Indian reservations." (Emphasis added.) 518 F.Supp. at 719-720.

Subsequent to the above ruling on the state's motion to dismiss, the Oneida Tribe and the state of Wisconsin entered into a stipulated judgment against the state in the Oneida case.¹

Although the state of Kansas has acquired criminal jurisdiction over offenses committed on Indian reservations by a different federal grant, i.e. 18 U.S.C. §3243, than that under which the states of Florida and Wisconsin have acquired similar jurisdiction, such fact is, in our opinion, irrelevant in considering whether penal provisions related to violations of state bingo laws are enforceable on Indian reservations. We are compelled by the ruling in the Oneida case, and, to a lesser degree, by the judgment in the Butterworth case, to conclude that the Kansas bingo law may not be enforced against Indians conducting bingo games upon Indian reservations within the territorial boundaries of the state of Kansas. Accordingly, our responses to the specific questions which have been posed are as follows:

"(1) Does the Bingo Tax Act, K.S.A. 79-4701 et seq., as amended, apply in its entirety, to games conducted on Indian reservations?"

ANSWER: No

"(2) If not, do any of the provisions of the Bingo Tax Act apply and, if so, which ones?"

¹Information supplied by John Niemisto, Wisconsin Asst. Att'y Gen.

ANSWER: None of the provisions of the act apply to bingo games conducted by Indians on Indian reservations.

- "(3) Can we validly collect the enforcement tax under provisions of the Act if the regulatory provisions of the Act do not apply?"

ANSWER: The 3% tax upon gross receipts received for participation in bingo games, or admission fees connected therewith, is imposed upon licensees. As Indians conducting bingo games on a reservation need not, in our opinion, comply with the licensure requirements or become "licensees," it is our judgment that the Department of Revenue may not collect the tax with respect to bingo games conducted by Indians on Indian reservations.

- "(4) Can we validly contract with the Tribal Councils of the respective tribes for purposes of obtaining 6% of the gross proceeds generated by bingo if the enforcement provisions and regulatory provisions of the Act do not apply?"

ANSWER: The powers of a public officer or agency are "those and only those which the law confers." State ex rel. v. Younkin, 108 Kan. 634, 638 (1921). In this regard, we are unaware of any statutory provision which would expressly or impliedly authorize the Department of Revenue to enter into such a contract.

- "(5) Can this department enforce the provisions of the Act as to non-Indians playing on the reservations?"

ANSWER: No. See Seminole Tribe of Florida v. Butterworth, supra.

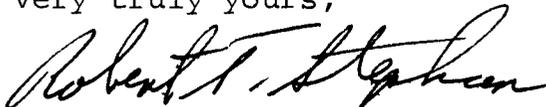
- "(6) Would the use of 'pull tabs' be illegal?"

ANSWER: As stated above, the state of Kansas has jurisdiction over criminal offenses committed by or against Indians on Indian reservations. Although penal provisions related to the conduct of bingo games by Indians on reservations cannot, in our judgment, be enforced, it is our opinion that all other state gambling laws may be enforced upon Indian reservations, since such laws are prohibitory in nature (unlike the bingo laws). Therefore, in our judgment, the use of "pull tabs"

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by Indians or non-Indians upon an Indian reservation may, where the elements of a criminal offense are present, be prosecuted under state gambling statutes.

Very truly yours,



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Attorney General of Kansas



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RTS:BJS:TRH:jm