



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 30, 1991

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

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.

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
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General