



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 14, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 101

Phillip A. Burdick
Brown County Attorney
112 South 7th Street
Hiawatha, KS 66434

Re: Crimes and Punishment -- Code; Crimes
Against the Public Morals -- Pull Tab
Games on Indian Reservations

Synopsis: The term "lottery" includes pull tab games and any game or combination of games involving consideration, chance and a prize. The constitutional amendment permitting a state owned and operated lottery is civil/regulatory in nature and therefore may not be enforced against Indians conducting lottery games on Indian reservations within Kansas. Cited herein: K.S.A. 21-4302; L. 1986, ch. 414; Kan. Const., Art. 15, §§3b, 3c.

* * *

Dear Mr. Burdick:

You request our opinion as to the effect Kansas Constitution Article, 15, section 3c, the "lottery" amendment, will have on the legality of pull tab gaming on the Iowa tribe Indian reservation in Kansas.

Before we answer the question of legality, a more fundamental question must first be answered. Does the term "lottery" as used in the Kansas lottery amendment include "pull tab" type games?

The constitutional provision as voted on and passed by the Kansas electorate did not define or restrict the term lottery nor did it define or restrict itself to any specific games. Thus, definitional responsibility of defining lottery was passed to the courts of the state. In construing constitutional provisions, the Supreme Court of Kansas has stated in State, ex rel. v. Highwood Services, Inc., 205 Kan. 821, 825 (1970):

"[A] constitution is not to be narrowly or technically construed but its language should be held to mean what the words imply to the common understanding of men; that in ascertaining the meaning of constitutional provisions courts should consider what appears to have been the intent and understanding of the people at their adoption." (Citations omitted).

In Highwood, the court's research included lottery definitions from Abbott's Law Dictionary (1879), Webster's Third New International Dictionary, unabridged, (1964), the Oxford Illustrated Dictionary (1962) and the Random House Dictionary of the English language, the Unabridged Edition (1976). Thus, in defining the term "lottery" the court has adopted common usage definitions of lottery:

"'a scheme for the distribution of prizes by lot or chance; esp.: a scheme by which prizes are distributed to the winners among those persons who have paid for a chance to win them, usu. as determined by the numbers on tickets as drawn at random (as from a lottery wheel).'"

The court further refined the various definitions into three required elements in order to be recognized as a lottery in Kansas. "The court has held that the essential elements of a lottery are three: (1) consideration, (2) prize, and (3) chance." Highwood, 205 Kan. at 823. Using this three element definition the court had adhered to the constitutional provision banning lotteries and struck down such efforts prior to the enactment of Kan. Const. Art. 15, sec. 3c. The State, ex rel v. Mercantile Association, 45 Kan. 351 (1891) [distribution of prizes by chance]; In re Smith, Petitioner,

54 Kan. 702 (1895) [sale of lottery tickets]; State ex rel., v. Fox Kansas Theatre Co., 144 Kan. 687 (1936) [theater bank night]; City of Wichita v. Stevens, 167 Kan. 408 (1949) [punchboards]; State v. Brown, 173 Kan. 166 (1952) [punchboards].

In considering the lottery provision, numerous individuals and state agencies advanced definitions for the term lottery. Included in the minutes were reports that "new forms of lottery games are constantly being invented," Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Russ Mills, Legislative Research Department, Attachment A., and "there are currently several types of lottery products being played ... weekly game or draw lottery ... instant lottery ticket ... online system ... numbers game ... pick four." Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Secretary of Revenue Harley Duncan, Attachment B.

It was further presented that some states have restricted their lottery to specific games. Minutes of the House Federal and State Affairs Committee, January 21, 1986, testimony of Patrick J. Hurley, Attachment C. The Kansas Legislature did not preclude any specific game or games with the language used in 1986 Senate Concurrent Resolution 1609, L. 1986, ch. 414. (Emphasis added).

In our judgment the game of "pull tabs" would fall within the scope of the Kansas constitutional lottery amendment since it is an unrestricted provision.

In Attorney General Opinion No. 87-38, this office indicated that:

"The lottery could include both an active game and a passive game. An active game has been recognized as a lottery game in which the player takes action to determine the outcome by choosing a number or set of numbers to bet on, attempting to match the numbers later drawn. A passive game is a lottery game in which the player takes no active part in determining the outcome; the ticket sold is either a winner or a loser, and no choices of numbers are made. Minutes of the House Federal and State Affairs Committee,

January 16, 1986, testimony of
Secretary of Revenue Harley
Duncan. Attachment B."

To be recognized as a lottery, three essential elements must be present in either an active or a passive game, (1) consideration, (2) prize and (3) chance. K.S.A. 21-4302(2). In an earlier case, Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, 787 F.2d 1434 (10th Cir. 1986), the United States Court of Appeals defined "pull tabs" as a game of chance wherein a factory sealed cover is removed from a paper card to reveal what if any prize is won. Hence, "pull tab" games squarely fit into the description of passive game as set forth above and would constitute a lottery.

This office sees no great dissimilarity in removing a factory sealed cover from a paper card as compared to scratching out a latex box on a paper ticket similar to those currently used in the Missouri, Iowa and Illinois instant lotteries.

Having determined the Kansas lottery amendment to be inclusive of pull tab games, we now turn our attention to the legality of these pull tab games on the Iowa tribe Indian reservation in Kansas. The issue of legality turns on whether the lottery amendment is prohibitory or regulatory in nature.

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. In 1987 the Kansas Constitution was again amended to permit not only a state owned lottery but also to allow for parimutuel betting on horse and dog racing.

In the recent case State of California, et al. v. Cabazon Bank of Mission Indians, 107 S.Ct. 1083 (1987), the Supreme Court upheld the right of Indian tribes to engage in, or license and regulate, gaming activities on the reservations free of state licensing and regulation. The court noted that this right arises, under Federal Indian Law, where a state permits this kind of activity and regulates it as a matter of civil/regulatory law.

In Cabazon, supra, California had attempted to prohibit bingo games on Indian Reservations in that state. The Federal District Court held that neither the state nor the county had

any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed.

In affirming the judgment of the Court of Appeals the Supreme Court applied a shorthand test of whether the conduct at issue violates the state's public policy. The Supreme Court relied on the Court of Appeals reasoning that if the intent of a state law is generally to prohibit certain conduct it will be criminal/prohibitory in nature. However, if the state law generally permits the conduct at issue, subject to regulation, it will be classified as civil/regulatory and therefore unenforceable on Indian reservations. In deciding that the California bingo statute was civil/regulatory in nature, the Supreme Court noted that California does not prohibit all forms of gambling. The court noted further that California operates a state lottery and encourages its citizens to participate in this state run gambling. Also the court noted that California permits parimutuel horse race betting. Finally the court stated:

"In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general."

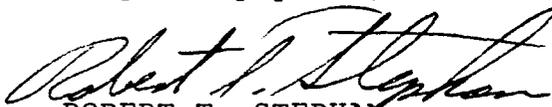
With the adoption of the state "lottery" amendment, Kan. Const., Art. 15, §§3b and 3c, Kansas now provides for state owned and operated lotteries as well the regulation of parimutuel betting on horse and dog racing. Adopting the Supreme Court's rationale in Cabazon and applying it to the Kansas "lottery" amendment we see that Kansas, like California, no longer prohibits all forms of gambling. As in Cabazon where California operated a state lottery and encouraged its citizens to participate, so too will Kansas operate a state lottery and encourage participation. The court also noted in Cabazon that California allows parimutuel betting on horse races. Similarly Kan. Const., Art. 15, §3b allows parimutuel betting on horse and dog racing.

With the passage of the state "lottery" amendment, participation in this state-run gambling is no longer contrary to the public policy of the state. The "lottery" amendment now permits rather than prohibits, subject to regulation, lotteries as well as parimutuel betting on dog and

horse racing in Kansas. Accordingly the "lottery" amendment must be considered civil/regulatory in nature rather than criminal/prohibitory. We are compelled by the ruling in the Cabazon case to conclude that the Kansas lottery amendment may not be enforced against Indians conducting lottery games upon Indian reservations within the territorial boundaries of the State of Kansas.

It is therefore our opinion that the definition of lottery includes the game of pull tabs and any game or combination of games as long as there is consideration, chance and prize involved in each game. Further, it is our opinion that the state lottery amendment is civil/regulatory in nature, and therefore, provisions relating to the conduct of lottery games by Indians on reservations may not be enforced.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Brenda L. Braden
Deputy Attorney General

RTS:BLB:cy