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ATTORNEY GENERAL OPINION NO. 92- 46

The Honorable Kathleen Sebelius
State Representative, Fifty-Sixth District
State Capitol, Room 280-W
Topeka, Kansas 66612

The Honorable Edward F. Reilly, Jr.
State Senator, Third District
State Capitol, Room 225-E
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--
Miscellaneous--Lotteries; Indian Gaming Regulatory
Act; Video Gaming

Synopsis: Video lottery games fall within the definition of
class III gaming under the Indian gaming regulatory
act and the national Indian gaming commission's
proposed rules. Cited herein: 25 U.S.C.S. § 2703;
56 Fed. Reg. 56,278 (1991) (to be codified at 25
C.F.R. § 502.1.

* * *

Dear Representative Sebelius and Senator Reilly:

You request our opinion regarding the Indian gaming regulatory
act (IGRA). Specifically, you inquire whether video lottery
games would fit within the act's definition of class II
gaming, therefore permitting Indian tribes to operate such
games without having to enter into a tribal-state gaming
compact.

In defining class II gaming the IGRA provides in part:

"(7)(A) The term 'class II gaming' means--

"(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technological aids are used in connection therewith)--

. . . .

"(B) The term 'class II gaming' does not include--

. . . .

"(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C.S. § 2703.

The national Indian gaming commission has proposed rules which define "electronic, computer or other technological aid" as:

"a device such as a computer, telephone, cable, television, satellite or bingo blower and which when used:

"(1) Is not a game of chance but merely assists a player or the playing of a game; and

"(2) Is readily distinguishable from the playing of a game of chance on an electronic facsimile; and

"(3) Is operated according to applicable Federal communications law." 56 Fed. Reg. 56281 (1991) [to be codified at 25 C.F.R. § 502.1(h)].

"Electronic or electromechanical facsimile" is defined as:

"any gambling device as defined in 15 U.S.C. 1171(a) (2) or (3) (except any gambling devices described in paragraph (h) of this section) and any games or

devices such as video bingo." Id., at § 502.1(i).

The commission explains its rationale for defining these terms in this way:

"An elementary principle of statutory construction is that an agency must give effect to all the terms used by Congress. Colautti v. Franklin, 439 U.S. 379 (1979). Therefore, in interpreting statutes, one cannot ignore distinctions intended by the use of distinctly different terms. In using the two terms ("electronic or electromechanical facsimiles of any game of chance" and "electronic, computer, or other technologic aids") in question, Congress intended the Commission to give effect to both. This the Commission did in proposing definitions for those terms.

. . . .

"In proposing definitions for "electronic, computer or technologic aid" and "electronic or electromechanical facsimile," the Commission relied heavily of the Senate Report accompanying S. 555.

. . . .

"Electronic or Electromechanical Facsimile.

"The significance of this definition is that it defines technology prohibited under the definition of class II gaming. Where technology goes beyond merely assisting in the playing of a game and becomes the game itself, the Commission proposes that such technology be classified as class III gaming and therefore under the jurisdiction of a tribal-state compact. To that end, the Commission proposes including any gambling device as defined in 15 U.S.C. 1171(a) (2)

or (3) ("The Johnson Act") except devices which are not games themselves and meet the criteria for technologic aid (e.g., bingo blowers).

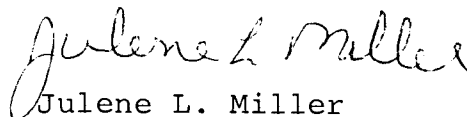
"In the Highlights portion of the Senate Report, under the heading Grace period, the Report states, '[a]ll video machines and other electronic or electromechanical facsimiles of games of chance (sic) may continue to operate for 1 year after the date of enactment of the bill to give tribes the opportunity to negotiate tribal-state compacts to cover the operation of such games.' In the view of the General Counsel, such language, along with the grace period language in 25 U.S.C. 2703(7)(D), provide clear and unambiguous guidance concerning Congressional intent with respect to this term. Congress clearly intended to classify as class III, video machines and other facsimile games. The grace period language is further explained and examples given in the Senate Report under the section titled Explanation of Major Provisions. There, the Report lists video bingo. Therefore, in the view of the General Counsel video bingo is a class III game." Id., at 56279. (Emphasis added).

These definitions and the commission's explanation therefore clearly establish video lottery games as class III, subject to tribal-state gaming compacts. We note that the commission's rules have not yet been formally adopted and are therefore subject to change, but had not been amended from the above-quoted version as of March 30, 1992.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Julene L. Miller
Deputy Attorney General