S T A T E O F T E N N E S S E E
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Opinion No. 01-064

State Lottery and the Federal Indian Gaming Regulatory Act

QUESTION

If the lottery prohibition is removed from Article XI, Section 5 of the Tennessee Constitution and the Legislature subsequently enacts a state lottery similar to Georgia's and allows § 501(c)(3) organizations to play bingo and conduct raffles, could the Governor be forced to negotiate to allow casino gambling by federally recognized tribal governments under the federal Indian Gaming Regulation Act, 25 U.S.C.A. §§ 2701, *et seq.*?

OPINION

Because Senate Joint Resolution 01 expressly states that it does not authorize games of chance associated with casinos, it would not be a gateway to Indian casino gambling in Tennessee. The State would not be required to negotiate with an Indian tribe about casino gambling, nor could the tribe sue the State without its consent to force the negotiation.

ANALYSIS

To answer the question, it is necessary to look at both state gambling law and the applicable federal law, the Indian Gaming Regulation Act (IGRA or Act), 25 U.S.C.A. §§ 2701, *et seq.* Currently, the Tennessee Constitution, Art. XI, section 5, flatly prohibits the General Assembly from authorizing lotteries. The constitutional provision does not, however, prohibit all types of gambling. Except for lotteries, there is nothing in the state constitution prohibiting gambling, and the regulation of all types of gambling, other than lotteries,[1] is a matter for determination by the General Assembly. *Secretary of State v. St. Augustine Church*, 766 S.W.2d 499, 500 (Tenn. 1989). Tennessee law provides for pari-mutuel betting and makes other types of gambling a crime. Tenn. Code Ann. §§ 4-36-101, *et seq.;* §§ 39-17-501, *et seq.*

Senate Joint Resolution 01 (SJR 01), recently passed by the Tennessee General Assembly, proposes an amendment to Article XI, section 5, of the Tennessee Constitution. Before the state

[1] Under Tennessee law, a lottery is a transaction in which three elements are present: consideration, prize and chance and includes bingo. *Secretary of State v. St. Augustine Church*, 766 S.W.2d 499, 501-02 (Tenn. 1989).

constitution can be amended, the people in Tennessee have to vote on the proposed amendment. That vote will take place at the 2002 November general election.

SJR 01, if approved by the voters, would amend the state constitution to permit the Legislature to authorize a state lottery, with the proceeds primarily dedicated to educating Tennessee citizens in this state's public educational institutions. The amendment proposed by SJR 01 expressly prohibits all other forms of lotteries, with one exception. By a vote of two thirds of both houses, the Legislature could authorize an annual [gaming] event[2] operated for the benefit of a Tennessee § 501(c)(3) organization. The amendment expressly states that it does not authorize games of chance associated with casinos, including, but not limited to slot machines, roulette wheels, and the like. The SJR 01 proposed amendment, then, would change the state's gambling laws by permitting a state lottery and lotteries conducted at "annual events" as described above but does not authorize other lotteries or casino type gambling. The General Assembly would continue to have the authority to prohibit or permit other types of gambling.

2. The Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act, passed in 1988, establishes a federal regulatory scheme over gaming by Indian tribes. The Act divides Indian gaming into three classes[3] and sets out a different regulatory system for each class. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 1119 (1996).

Lotteries and casino gambling fall within Class III gaming. For Class III gaming, IGRA provides, in summary, as follows:

> Class III gaming activities shall be lawful on Indian lands only if such activities are . . . authorized by [a valid tribal] ordinance or resolution . . . **located in a State that permits such gaming for any purpose by any person, organization, or entity,** and . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . . (Emphasis added.)

25 U.S.C.A. § 2710(d)(1). If a state permits Class III gaming "for any purpose by any person, organization or entity . . . ," then if a tribe requests that a state negotiate a tribal-state compact for Class III gambling, the state must enter negotiations in good faith. 25 U.S.C.A. § 2710(d)(3)(A); *see Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024, 1028 (2nd Cir. 1990). The Class III gaming

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[2] SJR 01 does not define "annual event," but it could not include casino-type gambling which is expressly prohibited by the resolution.

[3] Please see *Op. Tenn. Atty. Gen.* 01-019 (Feb. 7, 2001, copy attached) for definitions of Classes I, II and III gambling under IGRA.

compact must be negotiated and agreed upon by the Indian tribe and the state in which the tribal lands are located. 25 U.S.C.A. § 2710(d)(3)(A). The compact must then be approved by the Secretary of Interior. 25 U.S.C.A. S 2710(d)(3)(B).

For an Indian tribe to establish Class III gaming in Tennessee would require, at a minimum, (1) that the tribal group be federally recognized; (2) that the gambling take place on Indian land;[4] (3) that there be an approved tribal ordinance authorizing Class III gaming;[5] (4) that Tennessee permit such gaming for any purpose by any person, organization or entity; and (5) that there be a compact entered into by the tribe and the State which is in effect. *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546, 1552 (10th Cir. 1997).[6] Under IGRA, a state with Class III gambling would be required to negotiate. 25 U.S.C.A. § 2710(d)(3). The Act does not specify that the Governor negotiates, but it does have to be a state official who has the authority to enter into the compact. *See Pueblo of Santa Ana,* 104 F.3d at 1556. Which Tennessee state official(s) would have the authority to negotiate and execute the compact would be a matter of state, not federal, law. *Pueblo of Santa Ana,* 104 F.3d at 1558.

3. Defining the Scope of the Negotiation

Assuming the voters approve SJR 01, the question becomes whether an Indian tribe could conduct Class III gaming in Tennessee because Tennessee would then allow Class III gambling: a state lottery, pari-mutuel betting, and, possibly, "annual events" by charitable organizations. If yes, what would the scope of the permitted Indian gaming be: any Class III gaming or the Class III type gaming that the State allows? From a review of the federal law and the cases interpreting IGRA, we conclude that Tennessee would be required to negotiate with a tribe with respect to the specific Class III gaming activities permitted under Tennessee law.

Since IGRA was passed, several federal courts have reviewed this issue, and the prevailing view is that a state that allows Class III type gaming must negotiate with a tribe. The scope of the negotiation, however, would be the specific Class III gaming the state allows, not all Class III gaming. *See, e.g., Coeur*

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[4] Land taken into trust for the tribe prior to October 17, 1988, unless certain exceptional criteria are present. 25 U.S.C.A. § 2719.

[5] The tribe does not, however, have to have such an ordinance in effect to begin negotiations with the state on a tribal-state compact. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1028 (2nd Cir. 1990), *cert. denied, Connecticut v. Mashantucket Pequot Tribe*, 499 U.S. 975 (1991).

[6] C*ert. denied*, 522 U.S. 807 (1997).

d'Alene Tribe v. Idaho, 842 F. Supp. 1268, 1276 (D. Idaho 1994);[7] *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1258 (9th Cir. 1996).

What type of Indian gaming, if any, could be established if Tennessee had a state lottery would depend on a detailed factual analysis of the proposed gaming. *See Coeur d'Alene Tribe,* 842 F. Supp. at 1276. Under IGRA, the law and public policy of the state set the scope of permissible Class III gaming on tribal lands. *Coeur d'Alene Tribe,* 842 F. Supp. at 1276-80. Thus, because casino type gambling would remain prohibited in Tennessee, the State would not have to negotiate with an Indian tribe regarding casino gambling. Nor could a tribe sue the State without its consent to force the negotiation. *Seminole Tribe of Florida,* 116 S.Ct. at 1119.

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[7] *Aff'd,* 51 F.3d 876 (9th Cir. 1995), *cert. denied,* 516 U.S. 916 (1995). The Idaho Constitution expressly declares all gambling contrary to public policy and strictly forbids it, except for the state lottery, pari-mutuel betting and bingo and raffle games (but not casino gambling) operated by qualified charitable organizations. *Coeur d'Alene Tribe,* 842 F. Supp. at 1280.