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May 3, 2021

The Honorable Mia Costello
Alaska Senate
Alaska State Capitol Building
Juneau, AK 99811

Subject: Legal Opinion Regarding Electronic Pull-Tab Devices and Issues Related to Class III Gaming in Alaska

Dear Senator Costello:

Our firm has been retained to provide a legal opinion regarding Senate Bill No. 130 ("SB 130"), which would amend AS 05.15.690(38) to allow electronic pull-tab gaming in Alaska. Specifically, we were retained to provide a legal opinion regarding whether such a change would also expand the forms of Class III gaming that can be conducted by federally recognized tribal entities in Alaska.

As is explained in greater detail below, under controlling federal law, permitting one type of Class III gaming activity does not require states to let tribal entities conduct other forms of Class III gaming.

The federal Indian Gaming Regulatory Act ("Act") divides gaming into three classes, based on the characteristics of different games as defined in 25 U.S.C. § 2703. Under the Act, pull-tabs are Class II gaming activities only "if played in the same location as bingo."[1] When not offered in the same location as bingo, the National Indian Gaming Commission ("NIGC") considers pull-tabs to be Class III games.[2] Most electronic pull-tab games are an "electronic or electromechanical facsimile" of a typical pull-tab and are therefore considered a Class III game, whether or not bingo is the primary game at the location of sale.[3]

Under the Act, tribes are able to conduct Class I and II gaming activities on Indian lands.[4] The Act states that Class III gaming activities:

[1] 25 U.S.C. § 2703(7)(A)(i).
[2] NIGC Publication No. 1995-2, *Pull-Tab Sales on Indian Lands* (October 24, 1995).
[3] 25 U.S.C. § 2703(7)(B)(ii).
[4] 25 U.S.C. § 2710(a).

> shall be lawful on Indian lands only if such activities are . . . authorized by [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 . . .[5]

Currently, Alaska's charitable gaming laws do not permit the use of electronic pull-tabs.[6] A 2019 memorandum prepared by the Division of Legal and Research Services ("LRS Memorandum") raised the concern that a modification to Alaska law to permit electronic pull-tabs, such as that proposed in SB 130, could have the unintended consequence of requiring the State of Alaska to negotiate with tribal entities to allow them to conduct other forms of Class III gaming on Indian lands.[7] The LRS Memorandum cites *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990) and suggests that "[t]here have been conflicting decisions" on this issue.[8] This concern is misplaced. In *Mashantucket Pequot Tribe*, the Second Circuit held that because Connecticut allowed charitable organizations to conduct "Las Vegas Nights"[9] the state was required to negotiate with the tribe concerning the conduct of casino-type games of chance (i.e., Class III gaming) on the reservation.

There are a number of problems with the LRS Memorandum's citation of *Mashantucket Pequot Tribe* as a basis for concern that allowing electronic pull-tabs in Alaska would require the state to permit other types of Class III gaming. First, as demonstrated in *State v. Pinball Machines*, Alaska law rigidly limits permissible gambling activity to those activities that are expressly allowed in statute and prohibits all other forms of gambling.[10] A key aspect of whether a state is obligated to negotiate over a particular Class III gaming activity is whether the

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[5] 25 U.S.C. § 2710(d)(1).
[6] 15 AAC 160.470(f) "A mechanical or electronic device may not be used to select the symbols or numbers used to determine the winners of a pull-tab game."
[7] Other forms of Class III games include (but are not limited to) casino-type gambling, pari-mutuel horse and dog racing, and lotteries.
[8] LRS Memorandum at 2. A copy of the LRS Memorandum is included herein as Attachment A.
[9] The "Las Vegas Nights" permitted in *Mashantucket Pequot Tribe* included at least 13 different casino-style games of chance: blackjack, poker, dice, money-wheels, roulette, baccarat, chuck-a-luck, pan game, over and under, horse race games, acey-deucey, beat the dealer, and bouncing ball.
[10] 404 P.2d 923, 928 (1965) (holding that pinball machines that awarded free game play based on a combination of skill and chance constituted gambling devices not expressly authorized by statute and were therefore illegal).

state's legal framework with respect to such gaming is "prohibitive" or "regulatory."[11] Although Alaska does have a narrow carve out for regulated charitable gaming, generally unless expressly authorized by statute, Alaska law prohibits gambling under state criminal law. This is a significant distinction from the laws of other states that have addressed issues related to compact negotiations with tribes under the Act, such as Connecticut or Wisconsin, which have regulatory but not prohibitive gaming laws.[12]

Second, in *Mashantucket Pequot Tribe* the broad spectrum of 13 types of casino-style games permitted for "Las Vegas Nights" by Connecticut law is very different than an authorization of a singular Class III game such as an electronic pull-tab. The LRS Memorandum is unnecessarily concerned with the potential impacts from *Mashantucket Pequot Tribe* especially given that non-electronic, Class III pull-tabs are already permissible in Alaska. Furthermore, the *Mashantucket Pequot Tribe* decision did not require Connecticut to bargain with the tribe over other forms of Class III games that were not already permitted under Connecticut law, only those that the state had allowed at "Las Vegas Nights."[13] Thus, even an overly broad reading of *Mashantucket Pequot Tribe*, could only require a state like Alaska adopting a bill like SB 130 to negotiate to allow electronic pull-tabs on tribal lands. The state would not be required to negotiate over other forms of Class III gaming.

Most importantly, there is a controlling case from the Ninth Circuit (the federal court that has appellate jurisdiction over Alaska) that also makes it clear that allowing for one type of Class III gaming only obligates the state to negotiate with the tribes to allow for that particular type of Class III game. That case is *Coeur D'Alene Tribe v. State of Idaho*, in which the Coeur D'Alene Tribe sought to require the state to negotiate over the allowance of "extensive Class III gaming activities, including casino-style gambling, which the State contends are prohibited under

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[11] *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis.*, 770 F. Supp. 480, 487 (W.D. Wis. 1991) (finding that Wisconsin law did not prohibit those particular gaming activities even though they were not expressly authorized); *California v. Cabazon Band of Mission Indians,* 480 U.S. at 211 n. 10, 107 S.Ct. 1083 ("The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States,* 367 F.3d 650, 665 (7th Cir.2004) ("Wisconsin has not been willing to sacrifice its lucrative lottery and to criminalize all gambling in order to obtain authority under *Cabazon* and § 2710(d)(1)(b) to prohibit gambling on Indian lands.").

[12] *See generally,* AS 11.66.200-280.

[13] *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1031 (2d Cir. 1990) ("So here, the district court concluded, after a careful review of pertinent Connecticut law regarding 'Las Vegas nights," that Connecticut "permits games of chance, albeit in a highly regulated form. Thus, such gaming is not totally repugnant to the State's public policy. Connecticut permits other forms of gambling, such as a state-operated lottery, bingo, jai alai and other forms of pari-mutuel betting.'")

Idaho law and public policy."[14] The tribe argued that because Idaho permitted certain forms of Class III gaming, such as the statewide lottery, the Act permitted the tribes to conduct any and all forms of Class III gaming on their reservations. The District Court held:

> As to the fundamental issue, the court holds that the State is only obligated to negotiate a compact with the Tribes regarding Class III games which are permitted and/or are not prohibited by the laws and public policy of the State. Neither the language of IGRA, the *Cabazon* case on which it is based, the legislative history and statement of purpose of the Act, nor the later federal cases interpreting the Act, can be read to allow the Tribes to conduct casino-type gaming on reservations in Idaho, when the laws and public policy of Idaho are so clearly against such gaming. The State is required to negotiate only as to those Class III gaming activities permitted under state law: a lottery and pari-mutuel betting on horse, mule, and dog races.[15]

On appeal, the Ninth Circuit affirmed the District Court "substantially for the reasoning advanced in its published opinion.[16] Additionally, the Ninth Circuit pointed to its decision in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), stating:

> In *Rumsey,* we held that the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(B), permits Class III gaming activities on Indian lands "only if such activities are ... located in a State that permits such gaming for any purpose...." Thus, we concluded that where a state does not permit gaming activities sought by a tribe, "the tribe has no right to engage in those activities, and the state ... has no duty to negotiate with respect to them." In so concluding, we cited with approval Judge Ryan's well-reasoned opinion in the instant case.[17]

The position in the Ninth Circuit is clear: under the Act, only the specific Class III games that are authorized by a state are subject to compact negotiations with tribal entities.[18]

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[14] *Coeur D'Alene Tribe v. State*, 842 F. Supp. 1268, 1271 (D. Idaho 1994), *aff'd sub nom. Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995).
[15] *Id*. at 1283.
[16] *Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995).
[17] *Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995) (internal citations omitted).
[18] Precedent within the Ninth Circuit can only be overturned by an en banc vote of the entire circuit and not just by a three-judge panel. *See United States v. Villareal-Amarillas*, 562 F.3d 892, 898 n.4 (8th Cir. 2009) ("In the Ninth Circuit, a three-judge panel may reexamine a prior panel decision only if a supervening Supreme Court decision is 'clearly irreconcilable.' By contrast, we may

When two or more federal circuit courts reach conflicting decisions on the same legal issue (referred to as a "circuit split"), the Supreme Court of the United States may review the issue and resolve the conflict. If the *Mashantucket Pequot Tribe* decision in the Second Circuit were determined to conflict with the Ninth Circuit ruling in *Coeur D'Alene Tribe*, it is possible that the Supreme Court could review the decisions and overturn the finding in *Coeur D'Alene Tribe*. However, this does not appear to be likely. Although the LRS Memorandum suggests that there is a conflict between the *Mashantucket Pequot Tribe* and *Coeur D'Alene Tribe* decisions, the rulings appear to be consistent with each other and do not raise conflicting interpretations of the Act. In *Mashantucket Pequot Tribe,* the ruling required the state to compact with the tribes to allow for the same Class III games that it already allowed to be conducted on "Las Vegas Nights." That is consistent with the Ninth Circuit decision rejecting the arguments raised by the Coeur D'Alene Tribe claiming that the allowance of one type of Class III gaming activity opened the door to other types of Class III games. As such, it does not appear that there is a circuit split in those two cases that would require resolution by the United States Supreme Court.

Functionally, allowing pull-tabs to be offered electronically would not allow for a "new" Class III game in Alaska. Alaska allows pull-tabs to be played in locations that do not conduct bingo games, and so Class III pull-tab games are already legal in Alaska. The LRS Memorandum further acknowledges that Alaska also permits raffles, which is another form of Class III gaming. The concern raised in the LRS Memorandum that if one type of Class III gaming is permitted it would open the door requiring the state to negotiate with tribal entities over "all types of [C]lass III gaming" is predicated on a flawed interpretation of the *Mashantucket Pequot Tribe* decision.[19] If the LRS Memorandum reading of *Mashantucket Pequot Tribe* were correct, then Alaska would already be obligated to negotiate over other forms of Class III gaming with tribal entities, and allowing electronic pull-tabs would make no difference. Clearly, that is not the case, and the proper interpretation of *Mashantucket Pequot Tribe* is to read it consistently with the decision in *Coeur D'Alene Tribe*, which limits the state's obligation to negotiate with tribes to the types of Class III games allowed under state law. At most, permitting electronic pull tabs would allow a tribal entity to request negotiations to also operate electronic pull tabs but it would not obligate the state to negotiate for and allow other forms of Class III gaming.

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reconsider a prior panel's decision if a supervening Supreme Court decision 'undermines or casts doubt on the earlier panel decision.'" (quoting *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007))). This provides an additional measure of confidence in the precedential value of the decision in *Coeur D'Alene Tribe* should a similar issue arise in Alaska.

[19] Attachment A at 2. It should be noted that despite the misinterpretation of the *Mashantucket Pequot Tribe* decision, the LRS Memorandum correctly states that "It seems likely an Alaska court would follow Ninth Circuit precedent [the *Coeur D'Alene Tribe* decision] and find that only those types of class III gaming allowed in the state would be allowed by a tribe." *Id.*

As a result, we conclude that passing a law like SB 130 would not require Alaska to negotiate with tribal entities to allow other forms of Class III gaming that are not already specifically allowed by state law.

Sincerely yours,

KEMPPEL, HUFFMAN & ELLIS, P.C.

Jonathon D. Green

Attachment: Memorandum, dated December 16, 2019 (2 pages)

# LEGAL SERVICES

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**MEMORANDUM** December 16, 2019

**SUBJECT:** Electronic Pull-tabs (Work Order No. 31-LS1323\A)

**TO:** Senator Click Bishop
Attn: Darwin Peterson

**FROM:** Claire E. Radford
Legislative Counsel

Attached is the draft bill you requested, which provides for the purchase and playing of electronic pull-tabs. In drafting this bill, I looked at the issue of whether the use of an electronic device to purchase and play pull-tab games could open the door to class III gaming by Indian tribes in the state. The Indian Gaming Regulatory Act (IGRA) divides gaming into three classes:

> (1) Class I gaming includes social gaming for minimal prizes and traditional Indian gaming conducted at ceremonies or celebrations;
>
> (2) Class II gaming includes bingo, lotto, pull-tabs, punch boards, tip jars and non-banking card games, as well as banking card games operated on or before May 1, 1988; and
>
> (3) Class III gaming includes casino-type gambling, pari-mutuel horse and dog racing, lotteries, and all other forms of gaming that are not class I or II gaming.

The IGRA provides when and what type of gaming or gambling that Indian tribes may offer on Indian lands.[1] Class I gaming on Indian lands is within the exclusive jurisdiction of the tribes and is excluded from the provisions of the IGRA. Class II gaming on Indian lands is within the jurisdiction of the tribes but is subject to the provisions of the IGRA, including oversight by the National Indian Gaming Commission. Class III gaming activities are lawful on Indian lands only if authorized by a tribal ordinance or resolution, located in a state that permits such gaming for any purposes by any person, organization, or entity, and conducted in conformance with a tribal-state compact entered into by the tribe and state.

Pull-tabs are classified as class II gaming. However, the term "class II gaming" does not include "electronic or electromechanical facsimiles of any game of chance or slot

[1] 25 U.S.C. § 2701 et seq.

machines of any kind."[2] Electronic pull-tabs would therefore instead be a type of class III gaming. There have been conflicting decisions on whether allowing one type of class III gaming in the state would allow an Indian tribe to conduct other types of class III gaming on Indian lands. The Second Circuit determined that because the state of Connecticut allowed charities to conduct "Las Vegas nights" that the tribe could conduct all forms of class III gaming.[3] The Ninth Circuit later upheld a federal district court decision that found that Indian tribes were authorized to conduct only those types of class III gaming that were allowed in the state.[4] Some class III games are already operating in the state (raffles and pull-tabs are class II gaming, while lotteries are class III and probably the classics and similar games in the state are also class III gaming), but allowing certain types of computerized gaming, including the use of electronic pull-tab terminals, could open the door to other types through Indian gaming. As previously advised, it is unclear what a federal court would ultimately decide if this case were brought. It seems likely an Alaska court would follow Ninth Circuit court precedent and find that only those types of class III gaming allowed in the state would be allowed by a tribe.

If I may be of further assistance, please advise.

CER:kwg
19-353.kwg

Attachment

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[2] 25 U.S.C. §2703(7)(B)(ii).

[3] *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1029 - 1032 (2nd Cir. 1990).

[4] *Coeur d'Alene Tribe v. State of Idaho*, 51 F.3d 876 (1995), aff'g *Coeur d'Alene Tribe v. State of Idaho*, 842 F.Supp 1268 (D. Idaho 1994); *See also Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039 (9th Cir. 2015); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994).