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Texas House of Representatives

focus

REPORT

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Native American gambling operations: Are they legal?

Legal disputes over Native American gambling operations intensified in late 2001 and early 2002 when Texas' Tigua tribe closed its casino near El Paso under court order after the Alabama-Coushatta tribe opened its casino in east Texas. The Tiguas have said they will appeal the closure order to the U.S. Supreme Court, while a battle over the legality of the Alabama-Coushatta casino is underway in federal district court. The State of Texas calls the centers illegal gambling operations, while the tribes argue that the centers are permitted under federal and state laws. A separate federal action in late 2000 upheld more limited gambling offered by the state's Kickapoo tribe.

In general, the Tiguas and Alabama-Coushattas argue that they have the right to operate any form of gambling that the state has legalized. Authorization of the state lottery, they say, opened the door for the tribes to offer casino games with random number generators, such as slot machines, which have the same basis as the lottery. The state argues that the tribes specifically agreed to a prohibition on forms of gambling that state law prohibits, and that the games played in the casinos are either illegal in Texas or are not conducted with proper authorization.

Some oppose casinos on moral grounds, saying that they encourage compulsive gambling, increase crime, and have other negative effects on society. Others say that casinos are an aboveboard alternative to illegal gambling and cause no more ill effects than other tourist and entertainment attractions. The tribes also argue that they have the right to vie for some of the gambling business now being captured by entities in neighboring states, including Native American-operated casinos just across the state line — and close to the Texas tribes' casinos — in Louisiana and New Mexico.

Current legal showdowns will determine whether the State of Texas has the right to prohibit casino gambling on lands owned by Native American tribes.

Federal and state regulation

Gambling on Native American lands generally is governed by the federal Indian Gaming Regulatory Act (IGRA) of 1988. State law comes into play only when a tribe offers certain types of gambling, including most casino games.

IGRA divides games used for gambling into three classes. It gives tribes exclusive jurisdiction over Class I games, which include social games either for nominal prizes or as part of tribal ceremonies or celebrations. Tribes and the federal government regulate Class II games, which include bingo, pull tabs, and certain other games in which players compete against each other, rather than against the house.

All other games, including most casino games, fall under Class III and are subject to both state law and tribal jurisdiction. These include card games such as poker and blackjack, when banked by the house, and slot machines, parimutuel racing, and jai alai. Generally, tribes may conduct Class III games if a state-tribal compact has been negotiated, if the activity occurs in a state that allows such gaming for any purpose by any person, organization, or entity, and if other provisions of federal law are met. States and tribes often disagree, however, on what should be considered Class III gaming.

Different laws govern gaming operations by different tribes. In general, the Tiguas and Alabama-Coushattas are governed by the federal law that restored each tribe to federal jurisdiction, often called the Restoration Act: USCA, Title 25, sec. 737 for the Alabama-Coushattas and Title 25, sec. 1300g-6 for the Tiguas. The Restoration Act, not the IGRA, governs these tribes' gaming activities. The act contains an identical passage pertaining to each tribe: "All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe."

The current legal disputes hinge on interpretations of the Restoration Act and Texas' gambling laws. Gambling prohibitions in state law and in the Texas Constitution (Art. 3, sec. 47(a)) have been amended or reinterpreted several times to allow certain gambling activities, including

charity-sponsored bingo, the state lottery, parimutuel wagering, and certain charitable raffles.

The Speaking Rock controversy

The Tigua tribe (also known as the Ysleta del Sur Pueblo) opened Speaking Rock Casino and Entertainment Center in November 1993 on a 66-acre reservation about 12 miles from downtown El Paso. The center's activities included slot machines, poker and other card games, dice games, bingo, keno, and off-track betting. About 200,000 players a month visited the casino, generating revenues of about \$50 million to \$60 million a year. The casino had about 800 employees, including about 50 tribe members, and a \$14 million annual payroll.

The Tiguas say they have used profits from the casino for education, housing, and an elder program for tribe members; a chain of convenience stores and two oil and lube shops; acquisition of a 70,000-acre ranch in Jeff Davis County; an annual stipend for tribe members that was \$15,000 in 2000; and charitable contributions worth \$1.25 million since the casino opened. The charitable contributions include equipment for local police and fire departments and an emergency warning system for local schools. The tribe estimates that the casino generates hundreds of millions of dollars for the regional economy.

Is it legal? In 1999, Texas Attorney General John Cornyn filed suit in federal district court in El Paso, alleging that the Speaking Rock gambling activities violated the Restoration Act and asking the court to order the casino shut down. After the Tiguas raised questions about whether the attorney general had the authority to sue the tribe on behalf of the state, Cornyn amended the lawsuit so that it sought to have the casino declared a common nuisance in violation of the Penal Code. Civil Practice and Remedies Code, sec. 125.002 authorizes the attorney general to bring suit to enjoin and abate a common nuisance. Although the tribe argues that the state is using the nuisance statute improperly, the federal district court in January 2000 found that the attorney general had the necessary authority to bring a nuisance suit.

Different laws govern gaming operations by different tribes. State law comes into play only when a tribe offers certain types of gambling.

Gaming Compacts and Casino Operations

Under the federal Indian Gaming Regulatory Act (IGRA), tribes and states must agree to a state-tribal compact before certain types of gaming operations can take place on Native American lands. Negotiations over the compacts can involve tribes and governors, legislators, or others such as state gaming commissioners. Agreements generally cover the type of gaming to be permitted, where it will occur, and if the tribe will make any payment to the state. Gaming by the Tigua and Alabama-Coushatta tribes of Texas is governed by the tribes' Restoration Act, not by the IGRA.

As of early 2002, 24 states had entered into 162 gaming compacts with Native American tribes; two compacts were invalid because of litigation. Native American casino operations were authorized and operating in 13 states, as shown below. Some states with valid compacts allow other forms of gambling such as bingo, card games, or parimutuel betting.

State	Number of tribes with compacts	Year of earliest compact	Casino operations?
Arizona	17	1992	Yes
California	13	1990	No
Colorado	2	1992	Yes
Connecticut	2	1991	Yes
Idaho	3	1993	No
Iowa	3	1992	Yes
Kansas	4	1995	No
Louisiana	3	1992	Yes
Michigan	11	1993	Yes
Minnesota	11	1990	Yes
Mississippi	1	1993	Yes
Montana	6	1992	No
Nebraska	1	1990	No
Nevada	6	1990	No
New Mexico	16 (1 is invalid)	1995	Yes
New York	2	1993	Yes
North Carolina	1	1994	No
North Dakota	5	1992	No
Oklahoma	8	1994	No
Oregon	7	1992	No
Rhode Island	1 (invalid)	1994	No
South Dakota	9	1990	Yes
Washington	19	1991	Yes
Wisconsin	11	1992	Yes

Source: National Conference of State Legislatures.

In late September 2001, U.S. District Judge G. Thomas Eisele ruled that Speaking Rock had violated the Penal Code and the tribe's Restoration Act. Judge Eisele wrote that all games at Speaking Rock played with dice, cards, wheels, slot machines, keno board,

and bingo cards, as well as off-track betting, violate prohibitions against gambling in Penal Code, sec. 47.02, and constitute a common and a public nuisance under the

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Eight-Liner Update

Debate continues over the legality of “eight-liners,” electronic gaming machines found throughout Texas in venues ranging from convenience stores to truck stops to fraternal lodges to establishments billed as “casinos” set up solely to play the machines.

Critics say the machines are illegal gambling devices that proliferated under cover of 1993 and 1995 laws intended only to legalize amusement machines with no significant payoff. Machine owners, operators, and players counter that the machines are legitimate amusement games, authorized by law, that provide entertainment for players and revenue for Texans who operate the machines.

During this interim, House Speaker Pete Laney has charged the Criminal Jurisprudence Committee with reviewing the law governing the use of eight-liners and with suggesting ways to eliminate ambiguity about the legality of their possession and use.

For more information on eight-liners, including a description of how they work and a discussion of legislative proposals to change the laws dealing with amusement machines, see *A Fuzzy Issue: Are Eight-Liners Amusement or Gambling?*, House Research Organization Focus Report No. 76-4, February 2, 1999.

Legality issue

The legality of eight-liners and similar machines hinges on whether they fit the definition of “illegal gambling device” in the Penal Code, chapter 47. The statute prohibits certain types of gambling devices and defines illegal devices as electronic, electromechanical, or mechanical contrivances that, for a price, allow players an opportunity to obtain anything of value, with the prize awarded solely or partially by chance, even though some skill may be necessary. Owning a gambling device is a Class A misdemeanor, punishable by a \$4,000 fine, one year in jail, or both.

Under 1993 and 1995 amendments, the Penal Code legalizes “amusement” machines, electronic games that offer low-value prizes — such as fuzzy-animal toys,

trinkets, or a token redeemable for these types of prizes — as long as the value of prizes offered in a single play is limited to \$5 or to 10 times the cost of playing the games once, whichever is less.

However, in a January 1998 opinion, then-Attorney General Dan Morales ruled in Opinion DM-466 that the “fuzzy animal” law legalizing certain machines for amusement purposes is unconstitutional because it improperly authorizes the operation of a private “lottery.” Morales said that eight-liners appear to have the three elements necessary to constitute a prohibited lottery: (1) they operate on the basis of chance; (2) they require the payment of consideration to play; (3) they offer a prize, either coupons redeemable for gift certificates or, in some cases, cash. Without the “amusement” exemption, eight-liners would be illegal if they met the Penal Code’s definition of illegal gambling devices, and it is likely that a court would find that they do meet that definition, Morales said.

Some machine owners and operators argue that Morales’ opinion is not the definitive word on the subject. They cite an April 2000 ruling by the Amarillo Court of Appeals in a case concerning possession of a gambling device, *Owens v. State* (19 S.W. 3d 480), that held that the trial court erred in holding the amusement-machine exemption unconstitutional.

The Amusement and Music Operators of Texas, a trade association whose approximately 350 members operate coin-operated machines such as jukeboxes and pool tables as well as eight-liners, has said it believes that the law allowing eight-liners to operate in Texas is constitutional and that the machines clearly fit the Penal Code description of legal devices. Some machine owners argue that objections to the machines often stem from how they look, not from what they do. Others argue that eight-liners are games of skill — for example, shooting basketballs into a hoop — that operate within the 1995 law.

A task force appointed by Gov. George W. Bush concluded that eight-liners are illegal slot machines, cosmetically modified by manufacturers so as to appear to be for amusement purposes. In January 1999, the

task force, comprising legislators, law enforcement officials, prosecutors, state agency representatives, and public members, recommended amending the Penal Code so that it unambiguously prohibits all slot machines, including eight-liners.

Law enforcement authorities report that the number of successful prosecutions and guilty pleas in eight-liner cases has increased steadily since 1999. However, machine owners and operators note that courts also are returning not-guilty verdicts and have overturned some cases on appeal. The Texas Supreme Court is considering whether to hear two cases involving forfeitures of eight-liners and other evidence, *State v. One Super Cherry Master Video 8-Liner Machine*, 55 S.W. 3d 51, and *Hardy v. State*, 50 S.W. 3d 689.

A new legal question arose in November 2001 when the state Veterans of Foreign Wars (VFW) organization filed suit in Travis County district court alleging that Attorney General John Cornyn is breaking the law by providing unauthorized and wrong legal advice about eight-liners to local police departments and others. Many VFW halls operate eight-liners to raise money for their charitable activities. The organization maintains that eight-liners are not gambling devices if properly configured.

The lawsuit argues that Government Code, sec. 402.045 prohibits the attorney general from giving legal advice to persons not listed in sec. 402.042 of that code, and that local police departments are not such an entity. It also argues that the attorney general has no authority to initiate criminal prosecutions and that Cornyn is giving advice that misinterprets the law concerning eight-liners. The Office of the Attorney General (OAG) says its activities are sanctioned by the Texas Constitution, Art. 4, sec. 21, or by the statutes.

Law enforcement efforts

After the 1999 Legislature left unchanged the statutes dealing with gambling devices, some law enforcement agencies stepped up efforts to use the existing law to crack down on eight-liners. The 2001 Legislature also made no changes to the law. Some machine owners and operators argue that if lawmakers had wanted to outlaw the machines, they would have changed the statutes to prohibit them clearly.

Policies on investigating and prosecuting eight-liner cases can vary among counties and among jurisdictions within a county. Some local police departments and prosecutors vigorously pursue eight-liner cases, while others do not.

Most prosecutions dealing with eight-liners involve charges such as possession of a gambling device or gambling paraphernalia, gambling promotion, and keeping a gambling place. Some law enforcement agencies and prosecutors report difficulties using current law due to the complexity of the statutes dealing with gambling devices, "gray" areas in the law, and competing demands for resources to address other crimes. Others say it is difficult to prosecute eight-liner cases because machine owners and operators constantly change the machines or their operations. Because most gambling offenses are misdemeanors, some machine operators are willing to risk criminal prosecution to reap huge profits, according to some law enforcement authorities.

While local law enforcement agencies and prosecutors are responsible for criminal prosecution in eight-liner cases, they can receive help from the OAG and from the state Department of Public Safety (DPS).

In August 1999, Gov. Bush awarded the OAG a three-year grant totaling \$1.5 million to prosecute illegal gambling in Texas. The attorney general's task force on illegal gambling works with local jurisdictions that ask for its assistance with investigations and prosecutions. The task force reports that from January 1999 through mid-January 2002, it was involved in eight-liner cases that yielded 13 guilty verdicts, 61 guilty pleas, and fewer than 10 not-guilty verdicts. Seizures had brought in about 2,350 machines, more than \$750,000 in cash, and more than \$62,000 in merchandise gift certificates; forfeitures had included about 1,040 machines, more than \$300,000 in cash, and more than \$41,000 in gift certificates.

DPS personnel can provide advice, manpower for eight-liner raids, and testimony during trial. The agency reports that since April 1998, it has been involved in cases that involved seizures of about 2,730 machines, \$800,000 in cash or checks, and \$260,000 in gift certificates.

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Civil Practice and Remedies Code. The judge said that the Restoration Act made it clear that the state could seek injunctive relief in federal court to enforce the act's ban on gaming. The enormous benefit to tribe members and others from the gaming operation, the judge wrote, did not justify the clear violation of the law. Only a legislative change would make it legal for the tribe to operate a casino.

Judge Eisele gave the tribe 60 days to shut down the casino and ordered the tribe to pay the state about \$152,000 in attorney's fees and \$7,000 in court costs. The tribe appealed the order, and the 5th U.S. Circuit Court of Appeals ordered that the casino could remain open while the court considered the case.

On January 17, the 5th Circuit issued a one-sentence ruling upholding the district court ruling. On February 11, the Tiguas shut down their casino when officially ordered to do so by the court. The tribe has asked the 5th Circuit for a rehearing and has said it will appeal the closure decision to the U.S. Supreme Court.

The Tiguas argue that, as a sovereign governmental entity, they can do everything that other such entities can do unless prohibited by the federal government, and they retain all rights that were not taken away by the federal government in the Restoration Act. Under the act's gaming provisions, the Tiguas say, an activity is available to the tribe unless prohibited explicitly. Therefore, they may conduct any type of gambling permitted in Texas.

The tribe maintains that the state Lottery Act, enacted in 1991, opened the door for slot machines, card games, and other gaming because the law allows games involving prizes, chance, and consideration. The Tiguas argue that their slot machines and other games are legal because they have the same basis — random number generators — as some of the games operated by the state lottery. Games such as poker are legal, the tribe argues, because some scratch-off lottery games are variations of poker; bingo and keno are legal because the state allows charity bingo, and the tribe can engage in off-track betting because such betting is authorized by the state's parimutuel racing act. According to the tribe's attorney, the Tiguas

abide by the Lottery Act's prohibition against video lottery terminals because these machines are prohibited specifically.

The state responds that the tribe specifically agreed to a prohibition on forms of gambling that are prohibited by the state and that the games played in the casino either are illegal in Texas or are not conducted with the proper authorization. For example, the attorney general argues, because slot machines are specifically illegal in Texas, they are illegal on Native American lands as well. An opinion by then-

Attorney General Dan Morales, DM-302 (1994), held that a slot machine amounts to an unlawful lottery and may not be authorized in absence of a constitutional amendment. The state also argues that card games such as blackjack and poker and other games such as roulette and keno are illegal at the casino because the house participates in these games and receives an economic benefit. The bingo and horse-racing games conducted by the casino are illegal, the attorney general argues, because the state permits only qualified, licensed entities to conduct these activities, and the tribe has not qualified or obtained a license from the state.

The Tiguas say that closing their casino will deprive many tribe members of jobs and will render the tribe unable to provide for the health care and education of its members. Others say that closing the casino will hurt the El Paso economy. In December 2001, Comptroller Carole Keeton Rylander reported that closing the casino would result in a loss of almost 2,200 jobs and about \$55 million in personal income in the region.

Previous legal battle. The 1999 lawsuit initiated by the state was not the first legal battle over gaming conducted by the Tiguas. In 1993, the Tiguas used the courts to try to force the state to negotiate a compact under IGRA so that the tribe could open a gambling center. U.S. District Judge Lucius Bunton of Pecos ruled that the state had to negotiate a compact with the tribe. In 1994, a 5th U.S. Circuit Court of Appeals panel threw out the lower court decision, ruling that the Tiguas had agreed to a prohibition against state-banned gambling in the Restoration Act (*Ysleta del Sur Pueblo v. Texas*, 36 F. 3d 1325 (5th Cir. 1994)). The U.S. Supreme Court refused to hear the Tiguas' appeal of the case.

The Tiguas and the Alabama-Coushattas argue that the state Lottery Act opened the door for slot machines, card games, and other gaming on Indian lands.

In 1998, Judge Bunton dismissed a suit brought by the Tiguas that asked the court to decide the legality of their gambling operations. This suit differed from the earlier suit in that it based its arguments on the Restoration Act, not on federal Indian gaming law, but the judge said the Tiguas could not sue the state without the state's consent.

The Alabama-Coushatta dispute

After voting in 1994 not to conduct gambling operations, the Alabama-Coushatta tribe reconsidered, voting in 1999 to open a casino. In November 2001, the tribe opened the Alabama-Coushatta Entertainment Center on its 4,600-acre reservation about 90 miles north of Houston. The center contains about 220 slot machines and about five tables for poker and blackjack. It has about 170 employees, of whom 65 are tribe members.

Also in November, the tribe filed suit in the U.S. District Court for the Eastern District of Texas, asking the court to declare that the tribe has authority to regulate gaming activities on its land. The tribe asked the court for an order preventing the state from taking actions that would interfere with the tribe's gaming activities. Attorney General Cornyn responded by asking the court to order the casino closed.

The Alabama-Coushattas, like the Tiguas, argue that the games in their casino are legal because the Restoration Act allows them to conduct any kind of gambling permitted in the state. The tribe's lawsuit said that Texas "sanctions and promotes a broad range of commercial and casino gaming activities, including a multifaceted State Lottery, an extensive parimutuel horse racing industry, an extensive commercial 'slot parlor' market, charitable carnival or casino nights, high-stakes bingo, raffles, casino [gambling on] 'cruises-to-nowhere' [beyond state jurisdiction], and widespread use of 'amusement devices,' which are slot machines that require a modicum of skill." The attorney general argues, as in the case of the Tiguas, that because casino gambling is illegal in Texas, it is illegal on the Alabama-Coushatta lands as well.

The state argues that games available in Native American casinos are either illegal in Texas or are not conducted with proper authorization.

Kickapoo gaming operations

The Kickapoo tribe opened the Lucky Eagle Casino on their land near Eagle Pass in August 1996 with high-stakes bingo, pull-tab bingo, and card games in which players compete against each other but not against the house. In general, the tribe's gaming activities are governed by IGRA, not by a restoration act.

The tribe maintains that all of its games are considered Class II gaming regulated exclusively by tribes and the federal government. In 1997, the Kickapoos filed a lawsuit in federal district court in Washington, D.C., asking the court to rule that their electronic pull-tab bingo machines, called Lucky Tab II, were legal Class II gaming devices. In pull-tab bingo, a player buys a ticket and then removes a covering from the game piece to see if the symbols printed on the ticket are winners. The electronic version dispenses a pull-tab ticket from a coin-operated machine and provides a video display of what is on the ticket.

In June 1998, Judge Ricardo M. Urbina ruled that the machines were illegal and could be operated only with state approval through a compact between the tribe and the state. The Kickapoos appealed to the U.S. Court of Appeals for the District of Columbia, which ruled in November 2000 that the Lucky Tab II machines are a Class II gaming aid and thus are not subject to state

regulation (*Diamond Game Enterprises, Inc. v. Reno*, 230 F. 3d 365 (D.C. Cir. 2000)).

The tribe is building a development that will include a new 106,000-square-foot casino, a hotel, an arena for sporting events, and a golf course. The

new casino, which the tribe says will offer the same games offered by the current casino, is scheduled to open within the next two to three months.

Recent legislative action

During the 77th Legislature in 2001, the House passed a bill that would have legalized gambling by the three Texas tribes. HB 514 by Hinojosa would have made it a defense to prosecution under the Penal Code if the gambling or gaming activities were permitted under IGRA and were conducted by a federally

recognized Indian tribe on tribal lands designated for gambling and recognized by the federal government on January 1, 1999.

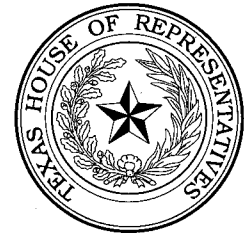
Supporters said the bill would not have allowed the expansion of gambling in Texas but would have given the Tiguas, Alabama-Coushattas, and Kickapoos a narrowly tailored defense to prosecution for casinos they already operated on tribal property. The bill would not have legalized casino gambling, supporters said, but merely would have provided a defense to prosecution in these specific circumstances. They said HB 514 would have legitimized a source of income that has allowed Texas tribes to improve their standard of living and become self-sufficient.

Opponents said the bill would have changed Texas law unconstitutionally to allow slot machines and other casino-style gambling. To be valid, they argued, such a change would have to be made by a constitutional amendment. HB 514 would have rewarded the tribes for illegal behavior and likely would have led to the expansion of gambling, opponents said, because once a form of gambling is legalized in Texas, the Legislature often expands on it in future sessions.

The House approved HB 514 by 82 to 60, with three members present, not voting. However, Lt. Governor Bill Ratliff, who consistently has opposed casino gambling, made it known that he would refuse to allow the bill to come to the Senate floor for a vote, and it died in the Senate Business and Commerce Committee.

— by *Kellie Dworaczyk*

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