

- SUBJECT:** Providing a defense to gambling offenses for Indian tribes
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 7 ayes — Hinojosa, Dunnam, Keel, Garcia, Green, Kitchen, Martinez Fischer
2 nays — Talton, Shields
- WITNESSES:** For — Gov. Albert Alvidrez and Tom Diamond, Ysleta del Sur Pueblo; Kevin P. Battise, Alabama/Coushatta Tribe of Texas; Ethel Bluit, Deep East Texas Council of Governments; Judge Dolores Briones, El Paso County Commissioners Court; Robert Brown, Tigua Indians; Isidro Garza, Jr., and Makateonenodua, Kickapoo Nation; *Registered but did not testify:* Margaret Boone; Sharon Dean; Hector Gutierrez; William Harrell, American Civil Liberties Union of Texas; Tom Rodgers, Alabama/Coushatta Tribe of Texas; JoAnn Shaw; Sally Velasquez, City of Eagle Pass
- Against — Weston W. Ware, Texas Baptist Christian Life Commission and Texans Against Gambling; *Registered but did not testify:* Rider Scott, Greater Dallas Crime Commission
- BACKGROUND:** Federal and state laws and negotiated tribal compacts govern gambling conducted by Indian tribes. The federal Indian Gaming Regulatory Act (IGRA) of 1988 establishes three categories of Indian gambling, each subject to different degrees of tribal, federal, and state jurisdiction.
- IGRA defines Class I gaming, subject exclusively to tribal jurisdiction, as social games either for nominal prizes or as part of tribal ceremonies or celebrations. Class II gaming includes bingo and related games, such as pull tabs, and some other games in which players play against each other, as opposed to against the house. Class II gaming is subject to tribal and some federal regulation but not to state regulation. All other gambling, including casino gambling, is classified as Class III and falls under state-tribal jurisdiction. Class III gaming is lawful on Indian lands only if it is conducted in accordance with a state-tribal compact that is in effect, if such activity is located in a state that allows such gambling for any purpose by any person or organization, and if other provisions of federal law are met. The level of

state and tribal regulatory oversight of Indian gambling in Texas is determined by the voluntary compact negotiations between the tribe and the state.

Texas has three federally recognized Native American tribes: the Alabama/Coushatta, who have a reservation in Polk County outside of Livingston; the Tiguas (known formally as Ysleta del Sur Pueblo), who have a reservation in El Paso; and the Texas Band of Kickapoos, who have a reservation near Eagle Pass. Before IGRA was enacted, the Alabama/Coushatta and Tigua tribes were prohibited from operating state-banned gambling activities by a 1987 federal law that restored the tribes to a federal trust relationship. The Kickapoos never were subject to the prohibition.

The Tiguas opened Speaking Rock Casino, a high-stakes bingo operation near El Paso, in November 1993. The tribe later added poker and other card games, pull-tab bingo dispensers, and slot machines. In 1993, the Tiguas tried to force the state to negotiate a compact so the tribe could open a gambling casino. They argued, among other points, that under federal Indian gaming law, Texas' creation of a state lottery in 1991 opened the door for the tribe to operate similar gambling activities, including slot machines. 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 law that restored the tribe to federal jurisdiction. The U.S. Supreme Court refused to hear the Tiguas' appeal of the case.

The Tiguas brought suit against the State of Texas in 1998, arguing that the slot machines are legal because they have the same basis — random number generators — as some of the games operated by the state lottery. U.S. District Judge Lucius Bunton of El Paso dismissed the case, ruling that the Eleventh Amendment to the U.S. Constitution bars the tribe from suing the state in federal court. The 5th U.S. Circuit Court of Appeals affirmed the district court's dismissal. Attorney General John Cornyn filed a lawsuit in September 1999 seeking a permanent injunction against the tribe's gambling activities. Trial is set for July 2001.

The Kickapoos opened the Lucky Eagle Casino on their land near Eagle Pass in August 1996 with high-stakes bingo, card games, and bingo pull-tab dispensers. The tribe claims authority to operate electronic bingo pull-tab games as Class II gaming devices under IGRA. 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, Lucky Tab II, dispenses a pull-tab ticket when a player puts money into the machine and also provides a video display of what is on the ticket.

In 1997, the Kickapoos filed a lawsuit in federal district court in Washington, D.C., asking the court to rule that the Lucky Tab II machines were legal Class II gaming devices. 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 announced that they would continue to operate the pull-tab machines while appealing the ruling to the District of Columbia U.S. Circuit Court of Appeals. The court ruled in November 2000 that Lucky Tab II machines are a Class II aid and therefore not subject to state regulation.

Penal Code, Chapter 47 prohibits gambling. Art. 47.09(a) lists the Texas statutes under which there is a defense to prosecution for gambling.

DIGEST: CSHB 514 would amend Penal Code, art. 47.09(a) to provide a defense to prosecution for gambling or other gaming activity permitted under IGRA, if the gambling or gaming was conducted by a federally recognized Indian tribe on tribal land recognized by the federal government on January 1, 1999, on premises designated by the tribe for gambling.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

SUPPORTERS SAY: CSHB 514 would not allow expansion of gambling in Texas. It specifically would allow only the Tiguas, Kickapoos, and Alabama/Coushattas to have a narrowly tailored defense to prosecution for casinos they run on tribal property recognized as part of their reservations on January 1, 1999. The date-specific limitation would prohibit tribes from expanding gaming operations to new sites around Texas.

CSHB 514 would not legalize casino gambling, which is barred by the Art. 3, sec. 47 prohibition against any but specified types of lotteries, but merely would provide a defense to prosecution, eliminating the need for a constitutional amendment. District attorneys still could take casino operators to court and make them prove that defense.

This bill would legitimize a source of income that has allowed Texas tribes to become self-sufficient. Before opening Speaking Rock Casino in 1993, the Tigua tribe had more than 50 percent unemployment and little assistance with educating their children, providing homes for their people, and caring for their elders. Now, the tribe earns \$50 million to \$60 million annually from the casino. Unemployment is below 1 percent, and the tribe has been able to build a state-of-the-art education center, buy land for affordable housing and build 70 homes, and fund health-care services for children and elders. The tribe also uses gambling revenues to fund tribal government services like law enforcement, water, sewer, roads, natural resource management, and social welfare programs. This money has allowed the Tiguas to diversify into other business ventures, including a service station chain and lube centers.

CSHB 514 would legitimize a casino that makes a large contribution to the El Paso area. El Paso was reeling from the loss of jobs in the wake of the North American Free Trade Agreement. When Speaking Rock Casino opened, unemployment in El Paso dropped. The casino provides jobs in El Paso with above-average salaries and benefits. Property values have gone up, giving the community more property taxes to fund programs. The Tiguas also provided funding for the renovation of the Mission Trail and equipment for emergency services in El Paso County. Tourism to El Paso has increased, and the city estimates that the overall impact of the casino's business on El Paso has exceeded \$800 million since it opened.

Before the Kickapoos opened their small casino, many lived under the International Bridge in El Paso because they had no lands. Now the tribe owns 125 acres in Eagle Pass. Before, most Kickapoo children were not educated. Now, they can pay for schools. Kickapoos have been able to invest new money for social services for their tribe, including almost \$500,000 to combat alcoholism and drug abuse.

CSHB 514 also would allow the Alabama/Coushattas to benefit from self-sufficiency much as the Kickapoos and Tiguas have. Jobless rates in Texas in December 2000 averaged 4.2 percent, but 46 percent of Alabama/Coushattas in Texas were unemployed. Only 1 percent of tribal members have four-year college degrees, and the median household income is only \$10,800. Gambling revenues would allow the tribe to lift its members from poverty.

CSHB 514 would make the same IGRA standard applicable to all three of Texas' federally recognized tribes. Also, the bill clearly would establish Texas' public policy regarding Indian gaming.

There is no need to wait for the federal court's decision in Texas' pending lawsuit regarding the Tiguas' Speaking Rock Casino. CSHB 514, if enacted, would nullify this lawsuit.

OPPONENTS
SAY:

CSHB 514 would change Texas law unconstitutionally to allow slot machines and other casino-style gambling. Attorney General Dan Morales determined in Opinion DM-302 (August 1994) that the Legislature cannot authorize slot machines in the absence of a constitutional amendment. To be valid, this change would have to be made by a joint resolution proposing a constitutional amendment that, if finally adopted by both houses, could be presented to Texas voters for approval.

Texans should have the right to express their opinions on legalizing Indian gaming by voting on this issue. Opinion DM-302 notes that when voters approved the constitutional amendment to allow a state lottery, they "did not intend to legalize the operation of slot machines, whether by a private individual or company, by the state, or by a private individual or company on behalf of the state." The Legislature must consider the concerns not only of the 2,000 Indians who would benefit from CSHB 514 but of the 20 million Texans whom it would affect.

CSHB 514 would reward the Tiguas for illegal behavior. When the federal Tigua Restoration Act of 1987 was adopted, the tribe's leadership pledged to Congress that it had no interest in conducting high-stakes bingo or other gambling operations on its reservation. The tribe broke its promise by

opening a casino in 1993 and continues to operate it in spite of a 5th U.S. Circuit Court of Appeals ruling against the tribe.

The Legislature should not preempt federal courts' authority in this matter. A lawsuit brought by the State of Texas is pending, and the Legislature should wait for the outcome before enacting any new legislation.

CSHB 514 would legitimize current casinos and allow their expansion, and future legislatures likely would allow further expansion. Those who support the availability of gambling all over Texas would want parity, whether by legitimizing "eight-liners" or allowing slot machines at race tracks. Historically, once any form of gambling is legalized in Texas, the Legislature has expanded on it in future sessions.

OTHER
OPPONENTS
SAY:

Enacting CSHB 514 would serve no useful purpose. The bill would provide a defense to prosecution under state law for Indian gaming, but such activity currently can be prosecuted only under federal law. If the Legislature wishes to legalize Indian casinos, it must enact a proposed constitutional amendment and allow voters to approve it. Then, the state would have to enter into a compact with the tribes allowing the gaming to take place.

NOTES:

HB 514 as filed would have made the date required for federal recognition of tribal land January 1, 2000.

The companion bill, SB 253 by Shapleigh, was considered in a public hearing by the Senate Criminal Justice Committee on April 18.