July 12, 2001

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative Regarding Tribal Video Machine Gaming

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 13, 2001, that would add two new sections to chapter 4, title 67, Idaho Code. Pursuant to Idaho Code § 34-1809, this office has reviewed the proposed initiative and has prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this proposed initiative, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLES

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered. The proposed initiative has provided a portion of such a short title that will be discussed below.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative would create a new provision titled "Authorized Tribal Video Gaming Machines" as Idaho Code § 67-429B. This section would authorize the use of video gaming devices on Indian lands with certain limited restrictions. The initiative would also create a new provision titled "Amendment of State-Tribal Gaming Compacts" as Idaho Code § 67-429C. This section would provide for an automatic "ratification" process for changes to state-tribal gaming compacts consistent with the provisions of Idaho Code § 67-429B.

A. Title and "Findings and Purpose"

Before turning to the substantive issues noted above we will review the title and "Findings and Purpose" section of the proposed initiative. Idaho Code § 34-1809 states that "the ballot title shall not be intentionally an argument or likely to create prejudice either for or against the measure." The title provided by petitioners is "Indian Gaming and Self-Reliance Act." As the act deals only with the definition of tribal video gaming machines and the process for amending state-tribal compacts, the inclusion of the term "self-reliance" could reasonably be construed as argumentative and may subject the title to attack.

In like manner, under section 2, "Findings and Purpose," in subsection (3) the statement that the tribes in Idaho have proceeded in good faith will raise some question as to the stance the state has consistently taken as to the illegality of the gaming currently conducted on tribal lands.

While a proposed bill may include a statement of purpose and findings that are subject to dispute, to do so in an initiative creates legal risk. The long title will need to describe such disputed findings. However, as noted above, the title must not be argumentative. Therefore, to place disputed factual findings with a corresponding title in an initiative creates the potential that the form of initiative will be challenged as violative of Idaho Code § 34-1809.

B. Section 3—Addition of Idaho Code § 67-429B

The language of the new section to be designated as Idaho Code § 67-429B(1) includes certain provisions that will likely be problematic.

First, that subsection states that "a tribal video gaming machine *plays only lottery games."* When read in connection with the later findings that these devices are neither slot machines nor electronic or electromechanical imitations of any form of casino gambling, such a definition could affect what constitutes a lottery in Idaho. If this definition of lottery was adopted and was found to be constitutional, any of the activities available to the tribes as defined by these sections would be available to the Idaho State Lottery. More likely, as discussed below, tribal video gaming machines would be construed as slot machines or imitations or simulations of forms of casino gambling.

We note that this subsection does state that the machines shall not be activated by a handle or lever. This distinction has lost much of its practical significance as the slot machine and casino industry currently uses machines with handles and machines without handles.

Another part of this subsection states that a tribal video gaming machine (TVGM) "does not dispense coins or currency." This language is sufficiently broad to allow for the machines to dispense tokens or chips. Again, it is our understanding that the slot industry began using tokens in slot machines that cost one dollar or more to play when the silver dollar went out of circulation.

The proposed language in Idaho Code § 67-429(B)(1)(E) also requires that the proposed gaming machines or proposed TVGM's select "randomly, by computer, numbers or symbols to determine the game results." Once again, it is an almost universal slot machine industry standard to employ computer-generated random numbers. In the recent state district court case of MBS Investments v. Lance, Case No. CV-OC-99-04815-D, Judge Kathryn A. Sticklen, of the Fourth Judicial District in and for the County of Ada, issued a Memorandum Decision and Order dated May 11, 2001. In that decision Judge Sticklen provided an extensive outline of the history and law surrounding the definition and prohibitions of slot machines. Ultimately, in her evaluation, she provided a synopsis of that law in a working definition of what constitutes a slot machine in the State of Idaho. Judge Sticklen stated:

> This Court determines that the commonly accepted meaning of the term "slot machine" is that of a mechanical or electronic gambling device by which a patron may risk money or a token to play a game of chance for gain of a prize or money. Specifically, a slot machine pays off by the matching of spinning reels. Additionally, Idaho Code § 18-3910 places a prohibition on "any slot machine of any sort." Therefore, any mechanical or electronic device by which a patron may risk money or a token to play a game of chance for gain of a prize or money falls within the statute.

Memorandum Decision and Order, p. 17 (emphasis added). Plaintiffs in that case have sought reconsideration of that decision.

The foregoing characteristics of "authorized tribal video gaming machines" indicate that they would likely be construed to be either slot machines or imitations of casino gambling within the meaning of Idaho's Constitution. Given the parameters provided by the provisions of the proposed statutory changes found in the initiative, and in light of Idaho's blanket restriction on the use or possession of slot machines, it is unlikely that attempts to distinguish tribal video gaming machines from slot machines or imitations thereof under Idaho law will succeed.

C. Proposed Idaho Code § 67-429(C)

The initiative, as proposed, also provides for the addition of a new section designated as Idaho Code § 67-429(C). In that provision, the initiative outlines a process whereby the state-tribal gaming compacts currently in existence may be amended in order

to take advantage of the provisions proposed in the earlier portions of the initiative. While there may be some procedural concerns, as outlined below, we note that, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1), state-tribal gaming compacts may allow any tribe within the borders of the State of Idaho to conduct any gaming if the state "permits such gaming for any purpose by any person, organization or entity." In the Shoshone-Bannock/State Tribal Gaming Compact, the Shoshone-Bannock Tribes are allowed to conduct any and all gaming allowed by the state to any other tribe within the state. Accordingly, should this initiative pass and be found constitutional, the Shoshone-Bannock Tribes, and potentially other tribes, may not be required to proceed with the provisions outlined in the proposed section 67-429(C), and would not be bound by the limitations found therein.

Also, section 67-429(C)(1)(b) requires that future negotiations be conducted "in good faith" between the state and tribe. Section 67-429 (C)(1)(b) also provides that the negotiations between the state and tribe regarding the number of machines allowed after 10 years shall be conducted under "a prudent business standard." This phrase is not defined and could easily be interpreted to mean if it were a reasonable business decision to add machines, the state would have to agree to allow them. If the intent of the initiative is to have limited gaming, this provision should be reconsidered or the phrase should be defined.

We recommend that "Indian lands" be defined. Proposed Idaho Code § 67-429(C)(1)(b) provides that the tribes "agree not to conduct Indian gaming outside of Indian lands." Without a more specific definition of what constitutes "Indians lands," disputes could arise over the intended meaning. "Indian lands" is a defined term in the Indian Gaming Regulatory Act. If that definition is the intended meaning, a statement to that effect in the initiative could avoid future disagreements over its meaning.

Section 5 of the initiative provides for what would be considered an emergency clause. In an attempt to expedite the effectiveness of the initiative, that provision states: "Notwithstanding any other provisions of Idaho law, this Act shall be in full force and effect immediately upon passage. No further action by the executive or legislative branches of the State government are required to implement the provisions of this Act." The language of that provision does not take into consideration normal canvassing and certification requirements.

Section 6, which has been labeled "severability," states, "it is the intent of the voters that, to the extent any term or provision is declared illegal, void, or unenforceable, the legislature take all available steps to enact such term or provision in a legal, valid, and enforceable manner, whether through a statute or a proposed constitutional amendment." To the extent that this language is an attempt to require a future legislature to pass further laws or constitutional amendments in order to assure the effectiveness of this initiative, any such attempts will be ineffective since an initiative has only the same legal effect as a

statute, and a future legislature cannot be restricted in its actions. *See, e.g.,* Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943); Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 978 (1988).

Article 3, section 20 of the Idaho Constitution prohibits all forms of gambling, except the types of gambling specifically enumerated in subsections 1(a) through 1(c). Article 3, section 20, subsection 2, specifically prohibits "any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, Keno and slot machines." This prohibition includes "any electronic or electromechanical imitation or simulation of any form of casino gambling."

The proposed initiative seeks to authorize on Indian lands a method of casino gambling that in our opinion would be prohibited elsewhere in the state by article 3, section 20 of the Idaho Constitution. Legislation that is passed via citizen initiative has the same force and effect as legislation passed by the legislature. *See, e.g.,* Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1988). Consequently, the initiative would almost certainly be challenged on grounds it would authorize gambling that directly conflicts with a constitutional requirement. *See, e.g.,* Simpson v. Cenarrusa, 130 Idaho 609, 944 P.2d 1372 (1997) (prohibiting the secretary of state from implementing certain ballot legend requirements promulgated via citizen initiative because those requirements violated constitutional provisions).

In our opinion, the argument that such a gaming statute or initiative is permissible cannot be premised upon an assumption that such gaming is permitted by the Idaho Constitution. Rather, the argument that such a law is valid must be based upon the following legal assumptions:

1. The Idaho Constitution does not apply on Indian reservations except as provided by federal law, and no federal law requires the Idaho Constitution to apply on Indian reservations.

2. Federal law is not offended by a state statute authorizing forms of gaming on Indian reservations that would not be allowed elsewhere in the state.

3. The legislature, or the people through an initiative, may allow an activity on Indian reservations that would be contrary to the Idaho Constitution if allowed elsewhere in the state.

We are not aware of any court decisions that answer all of these questions. Therefore, the proponents of the initiative should anticipate a court challenge if the initiative passes.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioners Coeur d'Alene Tribe and Nez Perce Tribe, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

WILLIAM A. VONTAGEN
Deputy Attorney General