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The Honorable Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 79711-2548

RQ-0214-GA

Dear General Abbott:

I write to seek your opinion concerning a number of issues surrounding potential legislation to authorize video lottery terminals ("VLTs"), pursuant to an amendment proposed to Article 3, § 47 of the Texas Constitution. In particular, I am interested in the potential impact of these changes in law on the ability of Indian tribes to offer casino gambling in Texas.

Current legislative proposals call for a constitutional amendment permitting VLTs – defined as providing a "game of chance" – to be offered by "licensed racetrack operators or recognized Indian tribes." House Joint Resolution 1, § 5. This would be a sharp break from current Texas law, which specifically bars "any electronic video game machine." *See* State Lottery Act, § 466.024(c)(2). Proposed legislation provides that tribes described in the Texas Constitution would be able to contract with the State to operate video lottery games "on behalf of [Texas] on tribal land." House Bill 1, § 8, amending § 466A.101(2), with a guaranteed portion of the "net terminal income" going to the state. *Id.*, § 466A.152.

I have questions concerning the impact of these proposals on four different groups of Indian tribes:

- The Texas Band of Oklahoma Kickapoos, who were recognized by the federal government in Public Law 97-429, 25 U.S.C. § 1300b-11, without any reference to the tribe's right to offer gaming.
- The other two recognized tribes in Texas – the Alabama- Coushatta Tribes of Texas and the Ysleta del Sur Pueblo (also known as the Tigua Indian tribe) – which were recognized under the Ysleta del Sur Pueblo and Alabama Coushatta Tribes of Texas Restoration Act in 1987, 25 U.S.C. § 1300g-1; that legislation specifically states that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." 25 U.S.C. § 737(a).

THE STATE OF TEXAS

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- Other Indian tribes not currently resident in Texas but with a historical relationship to Texas lands, such as the Comanche, the Kiowa, the Mescalero Apaches, and the Cherokees. As you know, a number of tribes around the country are demanding the right to offer gaming in jurisdictions where they formerly resided but from which they moved, or were removed. *See* "Tribes eye 27 million acres in state but will settle for casino," *Rocky Mountain News* (April 15, 2004) (Cheyenne and Arapaho tribes of Oklahoma demanding casino lands adjacent to Denver airport).
- Indian tribes in Texas that have not been recognized officially, but may be recognized in the future. I am advised that more than a dozen applications for recognition as Texas Tribes, or for the designation of tribal lands in Texas, are currently before the U.S. Department of the Interior. Among these are:

    - the People of LaJunta (Jumano/Mescalero)
    - Tap Pilam: The Coahuiltecan Nation
    - the Comanche Penataka Tribe
    - Tribal Council of the Carizo/Comecrudo Nation of Texas
    - The Tsalagiyi Nvdagi (Texas Cherokee)
    - Creek Indians of Texas at Red Oak

For each of these four different types of tribes, I would ask your response to the following questions:

1. **Can the state authorize VLT gaming on tribal lands outside the jurisdiction of the federal Indian Gaming Regulatory Act (IGRA)? Under 25 U.S.C. § 2510(d), VLTs on tribal lands would appear to be legal "only" if conducted pursuant to a Tribal-State compact that is approved by the U.S. Department of the Interior.**

2. **By authorizing VLTs on Indian reservations, which is a form of "Class III" or casino-style gaming in Texas under IGRA, 25 U.S.C. § 2701, *et seq.*, will the proposed constitutional amendment and attendant legislation effectively authorize Texas tribes to conduct all forms of casino-style gaming? Based on several legal precedents, it would appear that Texas may not be able to authorize *only* VLTs for tribal lands and prevent the offering of unlimited casino games. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990).**

3. **Is there a legal bar to the state receiving a share of the revenues from VLTs (including any obstacle posed by 25 U.S.C. § 2704(d)(4)), without a grant of territorial exclusivity or other unique benefit to the tribe? For tribes subject to IGRA, the federal government has refused to**

approve gaming compacts that directed to a State any share of gaming revenues in the absence of the conferring of some unique benefit on the tribe. *See* Letter from Assistant Secretary-Indian Affairs, U.S. Department of the Interior to Chief Cheryl Smith of the Jena Band of Choctaw Indians (March 7, 2002) (rejecting tribal gaming compact with 15 percent of revenues dedicated to state education fund).

I am formally requesting an Attorney General Opinion on the foregoing questions.

Thank you for your consideration in this matter.

Sincerely,