STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93033

DATE: April 27, 1993

SUBJECT: Constitutionality of LB 231 - Authorization of Governor to Negotiate and Enter Into Tribal-State Compacts Governing Indian Gaming.

REQUESTED BY: Senator Chris Beutler
Senator Brad Ashford
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of LB 231, as amended. Section 1 of LB 231, as amended, provides:

> Upon request of an Indian tribe having jurisdiction over Indian lands in Nebraska, the Governor or his or her designated representative or representatives shall, pursuant to 25 U.S.C. 2710 of the federal Indian Gaming Regulatory Act, negotiate with such Indian tribe in good faith for the purpose of entering into a tribal-state compact governing the conduct of Class III gaming as defined in the act. A compact which is negotiated pursuant to this section shall be executed by the Governor without ratification by the Legislature.

The initial question you ask us to address is "whether LB 231, as amended, violates the doctrine of separation of powers in Article II of the Nebraska Constitution by allowing the Governor to execute a tribal-state compact governing the conduct of gambling on Indian lands in Nebraska without ratification by the Legislature."

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Neb. Const. art. II, § 1. "The language of article II prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." ***State ex rel. Spire v. Conway,*** 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991).

As a general rule, the Legislature may not delegate its legislative powers. ***Smithberger v. Banning,*** 129 Neb. 651, 262 N.W. 492 (1935). The Legislature may, however, grant general powers to an official or agency and delegate the power to enact rules and regulations concerning the details of the legislative purpose. ***Gillette Dairy, Inc. v. Nebraska Dairy Products Board,*** 192 Neb. 89, 219 N.W.2d 214 (1974). A delegation of legislative authority is not unconstitutional where the Legislature has provided reasonable limitations and standards for carrying out delegated duties. ***Ewing v. Scotts Bluff County Bd. of Equal.,*** 227 Neb. 798, 420 N.W.2d 685 (1988). The approval of a tribal-state gaming compact appears to constitute a determination of public policy requiring legislative action. The question remains, however, as to whether the authority to enter into such a compact and bind the State may be delegated by the Legislature to the Governor (or his or her designated representative), and, if so, whether the provisions of LB 231 constitute a proper delegation of such authority.

In ***State ex rel. Stephan v. Finney,*** 251 Kan. 559, 836 P.2d 1169 (1992), the Supreme Court of Kansas addressed the question of whether the Governor of Kansas "ha[d] the authority independent of statute to negotiate [a tribal-state gaming] compact . . . and bind the State to its terms?" The Court answered this question in the negative, holding that "the Governor had the authority to enter into negotiations with the Kickapoo Nation, but, in the absence of an appropriate delegation of power by the Kansas Legislature or legislative approval of the compact, the Governor has no power to bind the State to the terms thereof." *Id.* at ___, 836 P.2d at 1185. (Emphasis added).

In our opinion, LB 231 does not violate the separation of powers requirement in Neb. Const. art. II, § 1, by impermissibly delegating legislative power to the executive branch. The provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 to-2721 [the "Act"] do not specify the procedures involved in negotiating and executing a tribal-state compact. With respect to the authorization of Class III gaming on Indian lands, § 11 of the Act (25 U.S.C. § 2710) provides that an Indian tribe shall request

the "State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." "Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). The Act further provides that "[a]ny State and Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of an Indian tribe, but such compacts shall take effect only when notice of approval by the Secretary [of Interior] of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). As the Act does not specify in what manner a "State" must negotiate or enter into tribal-state compacts for Class III gaming on Indian lands, the question of how such an agreement is reached (and who may bind a state to such an agreement) is a question determined by state law. As the Court noted in ***Finney,*** the Governor lacked authority to bind the State of Kansas to a compact, in part because of "the absence of an appropriate delegation of power by the Kansas Legislature". 251 Kan. at ___, 836 P.2d at 1185. To the extent that LB 231 simply provides "an appropriate delegation" of the power to negotiate and execute tribal-state compacts to the Governor or his or her designated representative, we do not believe that the bill improperly delegates legislative power to the executive department in violation of Neb. Const. art. II, § 1. Indeed, other states have adopted similar legislation authorizing an executive branch official to enter into tribal-state compacts under IGRA. ***E.g.*** Iowa Code Ann. § 10 A. 104.10 (West Supp. 1989); Wis. Stat. Ann. § 14.035 (West Supp. 1992).

Nor do we believe that the bill lacks adequate standards to guide the Governor's exercise of the power granted. Section 2 of the bill as amended includes numerous statements of policy by the Legislature which are intended to guide the terms of any compact negotiated pursuant to the Act. In view of the modern tendency "to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases", ***State ex rel. Douglas v. Nebraska Mortgage Finance Fund,*** 204 Neb. 445, 465, 283 N.W.2d 12, 24 (1979) (***quoting*** 1 Am. Jur. 2d ***Administrative Law*** § 118), we cannot conclude that the bill's provisions fail to provide adequate guidance to the Governor in exercising the authority granted.

In addition, you have asked us to "address the related question of whether the compact dated December 4, 1990 between the Department of Revenue and the Omaha Tribe may be executed without the express approval of the Legislature." This office, in a letter to former State Tax Commissioner John Boehm, concluded that the State Tax Commissioner possessed statutory authority to negotiate

and enter into tribal-state compacts for Indian gaming under the IGRA on behalf of the state. This opinion was based principally on legislation authorizing public agencies (including agencies or departments of the state) to enter into State-Tribal Cooperative Agreements. Neb. Rev. Stat. §§ 13-1501 to -1509 (1991). Consistent with this opinion, the Tax Commissioner entered into a Class III gaming compact with the Omaha Tribe on December 4, 1990. While this opinion refers to such agreements being "submitted to the Legislature for ratification", the compact with the Omaha Tribe has apparently not been ratified by the Legislature.

It is not at all clear, however, that legislative ratification is necessary to make the compact effective. If, in fact, §§ 13-1501 to -1509, while general in terms, are construed to contain a proper delegation of authority to the appropriate public agency (in this case, the Department of Revenue) to enter into agreements with Indian tribes, including tribal-state gaming compacts, then it appears that legislative ratification of the compact with the Omaha Tribe is not required. This is, however, a relatively murky area. Section 3 of LB 231 is obviously intended to clarify the validity of the compact between the State and the Omaha Tribe. Enactment of this portion of the bill would thus remove any question as to the validity of this compact.

Very truly yours,

DON STENBERG
Attorney General

L. Jay Bartel
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of Legislature

7-639-7.20

APPROVED BY:

DON STENBERG, Attorney General