Lotteries: Moose Hunting
Inland Fish & Wildlife: Moose Hunting Lotteries

LD 254
LD 588

STATE OF MAINE

Inter-Departmental Memorandum Date April 7, 1977

To Representative Charles G. Dow Dept.

From Jeffrey R. Pidot, Assistant Dept. Attorney General

Subject LD 254 and LD 588 - Constitutional Questions

You have asked for an opinion as to the constitutionality of the two above referenced bills, in light of the fact that they create a scheme in which persons may, upon payment of a fee, participate in a drawing for the chance to engage in moose hunting in the State. The legality of a similar, lottery-type scheme has apparently been questioned by the Idaho Attorney General in interpreting the Constitution of that State.

ANSWER: The moose hunting lotteries established by LD 254 and LD 588 are not in violation of the Maine or federal Constitutions although a question arises as to their permissibility under a technical reading of federal statutes relating to unlawful lotteries.

REASONING: Neither the Maine nor the federal Constitutions, unlike that of the State of Idaho, contain provisions which prohibit or otherwise deal with lotteries authorized by the State. Accordingly, there appears to be no constitutional infirmity related to the establishment by the State of Maine of a lottery scheme for the purposes here present.

There are, however, both State and federal laws which regulate and prohibit certain types of lotteries. 17-A M.R.S.A. Chapter 39 (§951 et seq) makes it a crime to engage in or conduct certain types of gambling, including lotteries. However, by defining "unlawful" gambling as gambling not expressly authorized by statute, this law appears to exclude from its coverage the State-created lottery scheme here proposed. See 17-A M.R.S.A. §952(11). In any event, it is obvious that the Legislature, were it to enact either LD 254 or LD 588, would by implication be de-criminalizing the State-operated lottery therein sanctioned. 1/

1/ It is noteworthy in this regard that the Legislature, when it created the Maine State Lottery, resolved any possible inconsistency with the State's gambling laws by providing:

> "No other law providing any penalty or disability for the sale of lottery tickets or any acts done in connection with a lottery shall apply to the sale of tickets or shares performed pursuant to this chapter." 8 M.R.S.A. §363

In the interest of clarity, consideration might be given to including a similar provision in LD 254 and LD 588 so as to expressly eliminate any conceivable inconsistency with 17-A M.R.S.A. Chapter 39 or 17 M.R.S.A. Chapter 14.

17 M.R.S.A. Chapter 14 (§330 et seq.) requires operators of games of chance, including lotteries, to obtain a license from the Chief of Police. Although it seems unlikely that the framers of either bill here at issue intend that the Department of Inland Fisheries and Wildlife register with the Chief of Police, any ambiguity could be resolved by including a general provision negating the applicability of such laws.

A technical issue arises by reason of the possible applicability to the scheme here proposed of the federal laws prohibiting lotteries. 18 USC §1301 et seq. makes it a crime to, inter alia, engage in the use of the mails, radio broadcasting or interstate commerce to operate a lottery. Since both LD 254 and LD 588 appear to contemplate the use of the mails for purposes of dissemination of information, collection of fees and notification of selection for moose hunting licenses, and since the elements of a lottery under federal law appear to be present in both proposed formats, 2/ there appears to be the possibility that a strict application 3/ of 18 USC §§1301 -1304 would bar the schemes here proposed.

However, since the federal lottery laws do not appear to be designed to impair the relatively innocuous scheme here considered, the likelihood of such an attack by the federal government might be remote despite the technical applicability of such laws to the procedures established by LD 254 and LD 588.

2/ The three necessary elements of a "lottery", for purposes of the application of federal law, are said to be the furnishing of consideration, the offering of a prize and the distribution of the prize by chance. See, e.g., Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (1910 2d Cir.). All of these indicia appear to be present in the chance drawing procedures of LD 254 and LD 588.

3/ Although 18 USC §1307 provides exemption for certain state-conducted lotteries from federal prohibition, such exemption by its terms applies only to functions, such as the Maine State Lottery, where there is involved "the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers." 18 USC §1307(d). Since it is assumed that the Department of Inland Fisheries and Wildlife would not, under the bills here involved, be awarding any part of the proceeds of the "moose hunt lottery" to the "winning" hunters, it appears that this exemption does not cover the proposed scheme.

If I can be of further assistance to you in this matter, please feel free to call upon me.

JP/bls

cc: Senator McNally
Representative McBreairty
Andrew Redmond, Chairman - Senate Committee on Fisheries and Wildlife
Maynard F. Marsh, Commissioner - Department of Inland Fisheries and Wildlife

bcc: Donald A. Alexander
Cabanne Howard