



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>KRIS MAYES ATTORNEY GENERAL</p> <p>February 22, 2024</p>	<p>No. I24-003 (R23-015)</p> <p>Re: Historical Horse Race Betting and Arizona's 2021 Amended Tribal-State Gaming Compact</p>
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To: Senator Theresa Hatathlie
Arizona State Senate

Questions Presented

In Opinion No. I18-010, this Office concluded that the Legislature would trigger the exclusivity provision in the Arizona Tribal-State Gaming Compact if the Legislature authorized pari-mutuel wagering on historic racing devices. Do the amendments to the exclusivity provision contained in the Amended Tribal-State Gaming Compact (the "2021 Amendments") change that conclusion?

Summary Answer

No. Opinion No. I18-010 correctly concluded that wagering on historic horse races via electronic devices ("HHR" devices or machines) was subject to the Arizona Tribal-State Gaming Compact's exclusivity covenant. Although the 2021 Amendments created additional exceptions to the exclusivity covenant, HHR machines do not fit within any of those exceptions. Consequently, it remains true that any legislative authorization of HHR devices would permit a tribal party to the

Compact to exercise their rights under the Compact to be released from certain gaming limitations and reduce the tribe’s gaming-proceed contributions to the State.

Background

I. Overview of HHR devices.

Pari-mutuel¹ wagering on historic racing devices is known by many different names, including historic horse racing or “HHR” (the term used in this Opinion), historical race betting, historic racing, and Instant Racing. *See* Ariz. Att’y Gen. Op. I18-010 (Aug. 23, 2018) at 4. All these terms refer to the same concept—the use of an electronic device or terminal to place bets on completed horse races in which the bettors do not know the race’s outcome. *Id.* at 4. As described in Opinion No. I18-010, early HHR machines worked as follows:

The bettor inserts money or its equivalent into the Instant Racing terminal and then chooses a horse identified by a number. The terminal then displays a video recording of the race for the [bettor] to watch, or . . . the bettor may forego the excitement of the actual race by opting to see immediately the results of the race and the outcome of his wager. Bettors are not given information from which they might identify the specific time and place of the actual running of the race, or the identity of the horse, but some statistical data regarding the horses is provided for bettors who wish to place their bets with some degree of deliberation.

Id. at 5 (citing *Appalachian Racing, LLC v. Family Tr. Found. of Kentucky, Inc.*, 423 S.W.3d 726, 730 (Ky. 2014)).

Device technology has since evolved and today, the “appearance, graphics, animation, and sound” of HHR machines is nearly identical to traditional slot machines and similar gaming devices that rely on random number generators. *See Examination of Historical Horse Racing*

¹ “Pari-mutuel” refers to “a betting pool in which those who bet on competitors finishing in the first three places share the total amount bet minus a percentage for the management,” or “a machine for registering the bets and computing the payoffs in pari-mutuel betting.” Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/pari-mutuel> (last visited Jan. 25, 2024).

Machines, C3 Gaming Group (Sept. 2021), at 10-11, <https://cdn.kobi5.com/wp-content/uploads/2021/10/Examination-of-HHRs-Sept-16-2021.pdf?x98333>; *id.* at 13 (showing an HHR gaming terminal that is visually identical to a slot machine). The primary difference between modern HHR machines and traditional slot machines is that instead of using a random number generator, HHR machines have game path predicated on a type of pari-mutuel wagering. *Id.* at 1, 11.

II. The Arizona State-Tribal Gaming Compact.

The Indian Gaming Regulatory Act (“IGRA”) establishes a regulatory structure for Indian gaming on tribal lands. 25 U.S.C. §§ 2701 to 2721 (2018). The Act divides gaming into three classes—Class I, Class II, or Class III. Class I gaming encompasses social gaming for prizes of minimal value and those traditional forms of Indian gaming that are part of tribal ceremonies and celebrations. 25 U.S.C. § 2703(6). Class II gaming encompasses bingo and certain card games, excluding banked card games and slot machines. 25 U.S.C. § 2703(7). Class III gaming covers all gaming that is not Class I or Class II. 25 U.S.C. § 2703(8).

The Class III gaming category includes pari-mutuel horse wagering and any “electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.” 25 U.S.C. § 2703(7)(B)(ii); *see also Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1032 (9th Cir. 2022) (recognizing pari-mutuel horse wagering as a type of Class III gaming); *accord*, Compact § 3(a). Under the IGRA, Class III gaming is lawful on tribal lands only if conducted in conformance with a Tribal-State compact entered into between the tribe and the State. 25 U.S.C. § 2710(d)(1).

The Arizona Tribal-State Gaming Compact, which became effective in 2003,² gave tribes an exclusive right to conduct certain gaming activities on tribal lands. Compact § 3(h). In return, the tribes agreed to contribute a portion of their gaming proceeds to the State and agreed to limitations on the scope of the permitted gaming on tribal lands. *Id.* §§ 3(c), 3(e), 12(b). This agreement was conditioned, however, on the State not permitting any person or entity other than a signatory tribe to “operate Gaming Devices; any form of Class III Gaming (including Video Lottery Terminals) that is not authorized under this Compact, other than gambling that is lawful on May 1, 2002 pursuant to [state law]; or poker, other than poker that is lawful on May 1, 2002 pursuant to [state law].” *Id.* § 3(h)(1). Subject to limited exceptions, if the Legislature were to authorize any of the types of gaming outlined under this exclusivity provision, the tribes may be released from certain of the Compact’s gaming limitations and may reduce their contributions to the State. *Id.* § 3(h).

III. AG Opinion No. I18-010.

In 2017, this Office was asked to opine on whether allowing non-tribal entities to engage in “pari-mutuel wagering at race tracks through the use of historic horse race terminals” would trigger the Compact’s exclusivity provision. (Request for Opinion Regarding Historical Horse Racing at 1 (Apr. 3, 2017).) Opinion No. I18-010 concluded that it would. Ariz. Att’y Gen. Op. I18-010 at 8-9.

As noted above, the Compact’s exclusivity provision is triggered by the authorization for a non-tribal entity to operate: (1) Gaming Devices; (2) any form of Class III Gaming not authorized under the Compact, other than gambling authorized by state law as of May 1, 2002; or (3) poker,

² The Compact was later amended in 2009, but those amendments did not impact the exclusivity provision. References to the “Compact” in this Opinion refer to the 2003 version unless otherwise indicated.

other than poker authorized by state law as of May 1, 2002. Compact § 3(h)(1). As of May 1, 2002, state law authorized non-tribal entities to engage in pari-mutuel wagering on horse races. A.R.S. § 5-112 (2002). Given that, and the framing of the question presented, the 2018 Opinion focused on subsection (2)—whether HHR devices constituted a form of Class III gaming authorized by state law as of May 1, 2002. If state law permitted operation of HHR devices as a form of pari-mutuel wagering on horse racing as of May 1, 2002, then non-tribal entities could operate such devices without triggering the exclusivity provision.

The 2018 Opinion observed that, as of May 1, 2002, state law allowed pari-mutuel betting on horse races if the individual placing the bet was “within the enclosure of a racing meeting” and wagering “on the results of a race held at the meeting or televised to the racetrack enclosure by simulcasting.” A.R.S. § 5-112(A). In addition, the law permitted all forms of pari-mutuel betting on horse races “televised by simulcasting.” *Id.* § 5-112(B) (2002). The Opinion ultimately concluded that betting via HHR devices did not constitute a legal form of pari-mutuel wagering on horse racing authorized as of May 1, 2002 because it did not involve a live race held within a race enclosure nor was it a simulcast of a live race. *Ariz. Att’y Gen. Op. I18-010 at 6-8.*³ Consequently, the 2018 Opinion advised that if Arizona were to authorize non-tribal entities to operate HHR devices, it would implicate the exclusivity provision in Section 3(h). *Id.* at 8.

³ The Opinion also questioned whether wagering via HHR device generally complied with Arizona’s pari-mutuel betting requirements, including the specific pool distributions required by Arizona law. *Ariz. Att’y Gen. Op. I18-010 at 8* (citing A.R.S. § 5-101(21) (2002)). That issue is necessarily fact-specific, however, as different HHR devices from different manufacturers use a variety of “pari-mutuel” game math to determine payouts and the technology continues to evolve. And in any event, the question presented today can be answered without determining whether a particular HHR device would comply with Arizona’s pari-mutuel pool distribution requirements.

IV. The 2021 Amendments to the Gaming Compact.

In 2021, the State entered into an Amended and Restated Tribal-State Gaming Compact with the tribal nations of Arizona. As relevant here, the 2021 Compact amends the prior Compact in three ways.

First, the 2021 Compact expands the definition of a “Gaming Device” to include “a fixed location or mobile mechanical device,” thus expanding the category of devices that the State may not authorize non-tribal entities to operate without implicating the exclusivity provision. *Compare* 2021 Compact § 2(nn), *with* 2003 Compact § 2(l).

Second, the 2021 Compact adds “(3) commercial bingo, other than commercial bingo that was lawful on May 1, 2019” to the list of gaming rights that belong exclusively to the tribes. *Compare* 2021 Compact § 3(h)(1), *with* 2003 Compact § 3(h)(1).

Third, the 2021 Compact adds additional exceptions to the exclusivity provision. *Compare* 2021 Compact § 3(h)(2), *with* 2003 Compact § 3(h)(2). Under § 3(h)(2) of the 2021 Compact, the State may now authorize the following types of gaming without implicating the exclusivity provision:

- (1) Off-Reservation Event Wagering;
- (2) Off-Reservation Fantasy Sports;
- (3) Lottery Keno; and
- (4) Lottery Draw Games.⁴

⁴ Under both the 2003 and 2021 Compacts, the following types of gaming do not implicate the exclusivity provision: (1) casino nights operated by non-profit or charitable organizations pursuant to and qualified under A.R.S. § 13-3302(B); (2) social gambling as defined in A.R.S. § 13-3301(7); (3) any paper product lottery games, including ticket dispensing devices of the nature used prior to the Effective Date by the Arizona State Lottery; and (4) low-wager, non-banked recreational pools or similar activities operated by and on the premises of retailers licensed under Title 4,

Analysis

I. HHR Devices are Gaming Devices or, alternatively, not an authorized form of gambling as of May 1, 2002.

Under the 2021 Amendments, authorizing non-tribal entities to operate HHR devices would trigger the exclusivity provision of the 2021 Compact if this form of wagering constitutes (1) a Gaming Device; (2) any other form of Class III Gaming not authorized by state law as of May 1, 2002; (3) commercial bingo, other than commercial bingo authorized by state law as of May 1, 2019; or (4) poker, other than poker authorized by state law as of May 1, 2002. Compact § 3(h)(1). HHR devices are clearly not a form of bingo or poker. As such, only the first two clauses of the exclusivity provision could be implicated by authorizing HHR machines.

The first clause concerns “gaming devices,” which the 2021 Compact defines as:

a fixed location or mobile mechanical device, electromechanical device, or device controlled by an electronic microprocessor or in any other manner, . . . which is used in connection with a game of chance, whether or not the outcome of the game is also affected in some part by skill, and where the game includes the payment of consideration in the form of coins, tokens, bills, coupons, ticket vouchers, pull tabs, smart cards, electronic in-house accounting system credits or any other forms of consideration and, through the application of chance, the player of the game may become entitled to a prize, which may be paid in coins, tokens, bills, coupons, ticket vouchers, smart cards, electronic inhouse accounting system credits or any other forms of value.

2021 Compact § 2(nn).

Although HHR devices vary across manufacturers, the defining characteristic of such machines is that they are electronic or electro-mechanical devices that allow a player to engage in a game of chance and receive a prize for winning. *See generally, Examination of Historical Horse Racing Machines*, C3 Gaming Group (Sept. 2021), <https://cdn.kobi5.com/wp-content/uploads/2021/10/Examination-of-HHRs-Sept-16-2021.pdf?x98333>. Thus, HHR devices

Arizona Revised Statutes, as may be authorized by State law. *Compare* 2021 Compact § 3(h)(2), *with* 2003 Compact § 3(h)(2). None of these exclusions encompasses HHR devices.

plainly meet the definition of “Gaming Device” set forth in the 2021 Compact, and their operation by non-tribal entities would trigger the exclusivity provision.

In addition, as Opinion No. I18-010 correctly concluded, wagering via HHR devices also fits into the second clause of § 3(h)(1) as “any other form of Class III gaming” not authorized by state law as of May 1, 2002.

On May 1, 2002, A.R.S. § 5-112(A) (2002) allowed pari-mutuel betting on horse races if the individual placing the bet was “within the enclosure of a racing meeting” and wagering “on the results of a race held at the meeting or televised to the racetrack enclosure by simulcasting.” Subsection B of that statute also allowed all forms of pari-mutuel betting on horse races “televised by simulcasting.” A.R.S. § 5-112(B) (2002); *see also* A.R.S. § 5-101(24) (2002) (defining simulcasting as the “telecast” of “live audio and visual signals”). Although HHR device technology continues to evolve, it remains true that all such devices utilize historic—that is, *not live*—horse races. Indeed, that is the defining characteristic of such games. Thus, the player is not within the enclosure of a racing meeting nor wagering on a race held as part of a live race meeting, whether viewed in-person or televised by simulcasting. Opinion No. I18-010 thus correctly concluded that wagering via HHR devices was not a lawful form of pari-mutuel betting on horse races on May 1, 2002. Op. I18-010 at 6-8. That remains true today under the 2021 Compact.

In sum, HHR devices fit the definition of “Gaming Devices” under the 2021 Compact and their operation continues to constitute a form of Class III gaming that was not lawful prior to May 1, 2002. Consequently, as under the 2003 Compact, authorizing non-tribal entities to operate HHR devices would trigger the exclusivity provision under the 2021 Compact, unless such devices fit one of the new exceptions thereto.

II. HHR Devices do not fall within any of the 2021 Compact’s new exceptions to the exclusivity provision.

We next examine whether any of the new exceptions to the exclusivity provision from the 2021 Amendments alter this outcome. *Compare* 2021 Compact § 3(h)(2), *with* 2003 Compact § 3(h)(2). Specifically, under § 3(h)(2) of the 2021 Compact, the State may now authorize the following types of gaming without implicating the exclusivity provision:

- (1) Off-Reservation Event Wagering;
- (2) Off-Reservation Fantasy Sports;
- (3) Lottery Keno; and
- (4) Lottery Draw Games.

The 2021 Compact also specifies that the exclusivity provision does not apply to “the triggering of any of the remedies set forth in Sections 3(g) and 3(h) of the 2003 Compact of any Continuing 2003 Compact Tribe.” *Id.* Otherwise, the exclusivity provision continues to apply in the same manner as it did under the 2003 Compact. As a result, unless one of the exceptions to the exclusivity provision in the 2021 Compact applies to HHR devices, this type of gambling continues to implicate the exclusivity provision.

The first exception for Off-Reservation Event Wagering covers betting on “sports events or other events, portions of sports events or other events, the individual performance statistics of athletes in a sports event or combination of sports events or the individual performance of individuals in other events or a combination of other events by any system or method of wagering, including in person or over the Internet through websites and on mobile devices.” A.R.S. § 5-1301(4). Critically, event wagers may not be made “upon an event whose outcome has already been determined.” A.A.C. R19-4-130(C). HHR wagering by its nature involves betting on an event

whose outcome has already been determined and so, the Off-Reservation Event Wagering exception does not encompass HHR wagering or devices.

The second newly added exception is Off-Reservation Fantasy Sports. Fantasy Sports is defined to explicitly exclude “racing that involves animals,” A.R.S. § 5-1201(6), and thus the term “Off-Reservation Fantasy Sports” does not include HHR wagering or devices.

Similarly, with respect to the third and fourth exceptions added, Lottery Keno and Lottery Draw Games means keno or draw games operated through the Arizona State Lottery. *See* 2021 Compact §§ 2(zz), (aaa). Neither HHR wagering nor HHR machines are keno, a form of lottery, nor some other type of draw game where numbers are selected to determine winners. Furthermore, HHR wagering and devices are not operated by the Arizona State Lottery.

Neither HHR wagering nor the use of HHR devices fits within any of the exceptions to the exclusivity provision provided in Section 3(h)(2) of the 2021 Compact. Accordingly, the conclusion of Opinion No. I18-010 continues to apply to the 2021 Compact.

Conclusion

Under both the 2003 and the 2021 Compacts, the exclusivity provision would be triggered if the State were to authorize non-tribal entities to operate HHR devices. And no exception to the exclusivity provision applies under either Compact. Consequently, Opinion No. I18-010’s conclusion applies to the 2021 Compact, notwithstanding the 2021 Amendments.

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