Opinion No. 13-02

OPINION OF GARY K. KING, Attorney General

September 26, 2013

BY: Mark Reynolds, Assistant Attorney General

TO: The Honorable William Sharer, New Mexico State Senate, P.O. Box 203, Farmington, New Mexico 87499

QUESTIONS:

1. Does Class III gaming at the Native American casinos violate the compacts originally outlined?

2. Is Class III gaming available to non-Native American racetracks or gaming venues and what can be done to put the two on equal footing?

3. If non-Native American horse racetracks agreed to submit to revenue sharing could they participate in Class III gaming to the same extent as Native American casinos?

4. Can the state allow non-Native American racetracks to offer Class II gaming without violating the terms of the compacts with the tribes?

5. If legislation allows the racetracks to offer Class II gaming, could the tribes lawfully breach the compacts and terminate the revenue sharing payments required by the compacts?

CONCLUSIONS:

1. No. New Mexico's Indian gaming compacts have always been intended to allow tribes to offer any and all forms of Class III gaming, subject to the terms and conditions of the compacts.

2. State law authorizes non-tribal horse racetracks to conduct some forms of Class III gaming. An expansion of Class III gaming for non-tribal horse racetracks would require legislative authorization and, if granted, would terminate the gaming tribes' revenue-sharing obligations under the current compacts.

3. No. If a non-tribal horse racetrack agreed to submit to revenue sharing, it could not conduct Class III gaming activities to the same extent as a tribal casino.

4. Yes. The state legislature may permit non-tribal horse racetracks to conduct Class II gaming activities without violating the terms of the compacts.

5. No. Legislation permitting horse racetracks to conduct Class II gaming activities would have no effect on the tribes' revenue-sharing obligations under the compacts.

ANALYSIS:

Class III Gaming Under the Compacts

In 1997, the Indian gaming compacts were approved by the legislature and signed by Governor Gary Johnson and thirteen tribes and pueblos. See Gaming Control Board website, www.nmgcb.org. The original terms of the Compacts are codified at NMSA 1978, Section 11-13-1 (1997) ("1997 Compact"). The Compacts were renegotiated in 2001 and eventually signed by the original thirteen gaming tribes and the Navajo Nation ("2001 Compact"). See Gaming Control Board website. The Compacts were subsequently amended in 2007 and nine of the gaming tribes signed the Compacts as amended ("2007 Compact"). Id. The terms of the renegotiated and amended Compacts are set forth in the annotations to NMSA 1978, Section 11-13-1.

The Compacts were entered into under the federal Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), which governs gaming activities by Native American tribes on Indian lands.[1] IGRA established three categories of Indian gaming: Class I, Class II and Class III. "Class I gaming" is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). The definition of "Class II gaming" covers bingo and card games that are authorized by state law, but expressly excludes "any banking card games, including baccarat, chemin de fer, or blackjack (21), or … electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." Id. § 2703(7)(A), (B).

IGRA defines "Class III gaming" as "all forms of gaming that are not class I gaming or class II gaming." Id. § 2703(8). Under the federal regulations implementing IGRA, "Class III gaming" includes:

> (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
>
> (2) Casino games such as roulette, craps, and keno;
>
> (b) Any slot machines … and electronic or electromechanical facsimiles of any game of chance;
>
> (c) Any sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or
>
> (d) Lotteries.

25 C.F.R. § 502.4 (2012). See also Doe v. Santa Clara Pueblo, 2007-NMSC-008, ¶ 10, 141 N.M. 269 ("Class III gaming includes banking card games (where the house has a monetary stake in the game because players bet against the house, not just against one another); casino games such as roulette, craps and keno; slot machines and electronic games of chance…").

IGRA permits a tribe to engage in Class III gaming activities only under a compact with the state. See 25 U.S.C. § 2710(d)(3)(A). Since 1997, New Mexico's Compacts have "provid[ed] for the regulation of Class III Gaming on Indian Lands as required by the IGRA." Compacts, § 1(C). The Compacts define "Class III Gaming" as "all forms of gaming as defined in 25 U.S.C. § 2703(8), and 25 C.F.R. § 502.4." Compacts, Section 2(A). The provisions referenced in the definition are the definitions of "Class III gaming" in IGRA and federal regulations implementing IGRA.

Section 3 of the Compacts is titled "Authorized Class III Gaming." Section 3 of the 1997 Compact, in pertinent part, authorized tribes to:

> conduct, only on Indian Lands, subject to all of the terms and conditions of this Compact, any or all forms of casino-style gaming, including but not limited to slot machines and other forms of electronic gaming devices; all forms of poker, blackjack and other casino-style card games, both banked and unbanked; roulette; craps; keno; wheel of fortune; pai gow; and other games played in casino settings; and any form of a lottery.

Section 3 of the 2001 and 2007 Compacts authorizes tribes to "conduct, only on Indian Lands, subject to all of the terms and conditions of this Compact, any or all forms of Class III Gaming."

While Section 3 of the 2001 and 2007 Compacts expressly authorizes "any or all forms of Class III gaming," Section 3 of the original 1997 Compact authorizes specific activities, such as "casino-style gaming" and lotteries, that constitute Class III gaming. See 1997 Compact, § 3, NMSA 1978, § 11-13-1. Read by itself, Section 3 might be viewed as a limitation on the forms of Class III gaming permitted under the 1997 Compact. However, we do not believe that was the legislature's intent.

Under the rules of statutory construction, a statutory provision "may not be considered in a vacuum," but must be read in the context of the entire statute. State ex rel. New Mexico Gaming Control Bd. v. Ten (10) Gaming Devices, 2005-NMCA-117, ¶ 16, 138 N.M. 426, cert. quashed, 132 P.3d 1039 (N.M. 2006). See also Rodeo, Inc. v. Columbia Casualty Co. 2007-NMCA-013, ¶ 19, 141 N.M. 32 ("individual portions of a statute cannot be viewed in isolation but must be interpreted by reference to the statute as a whole"), cert. denied, 141 N.M. 163 (2007). Applying these rules, the extent of Class III gaming contemplated under the 1997 Compact must be determined from all its provisions, not just Section 3.

Section 3 notwithstanding, other provisions of the 1997 Compact indicate that the legislature intended to permit tribes to engage in all Class III gaming activities authorized under IGRA. See, e.g., 1997 Compact, § 1 (Compact's purposes include providing for regulation of "Class III Gaming on Indian Lands" and the "establishment, by the Tribe, of rules and procedures for ensuring that Class III Gaming is conducted fairly and honestly"), § 2(A) (defining "Class III Gaming" for purposes of the Compact as "all forms of gaming" as defined in IGRA), § 4(A) (Tribal Gaming Authority "shall assure that the Tribe will … operate all Class III Gaming pursuant to this Compact, tribal law, the IGRA and other applicable Federal law"). This interpretation is bolstered by the gaming tribes' revenue sharing agreement under the 1997 Compact, which was expressly conditioned on the tribes' "exclusive right within the State to provide all types of Class III Gaming described in the … Compact…." Revenue-Sharing Agreement, § 1(A), NMSA 1978, § 11-13-2 (1997). As stated above, "Class III Gaming" under the 1997 Compact was defined as "all forms of gaming" covered by IGRA's definition of Class III gaming. See 1997 Compact, § 2(A). Of course, any ambiguity regarding the gaming activities that were permissible under the 1997 Compact was eliminated when the Compact was renegotiated in 2001 and Section 3 was amended to permit "any or all forms of Class III gaming."

In summary, based on the language and history of the Compacts, we believe the Compacts were always intended to allow tribes to conduct any and all forms of Class III gaming at their casinos.

Class III Gaming at Horse Racetracks

Certain types of Class III gaming are currently available at New Mexico's horse racetracks. Specifically, horse racetracks offer betting on gaming machines, live horse racing and horse race simulcasting. The Horse Racing Act authorizes betting on live horse racing and simulcasting. See NMSA 1978, § 60-1A-15 to -17 (2007). Horse racetracks may be issued a license under the Gaming Control Act to operate slot machines and similar gaming machines on their premises where live racing is conducted. See NMSA 1978, § 60-2E-27 (2009). With these exceptions, state law does not authorize horse racetracks to offer Class III gaming activities to the same extent as tribal casinos under the Compacts.

To place horse racetracks on an equal footing with the tribal casinos by allowing the horse racetracks to offer any and all types of Class III gaming would require legislative authorization. State law reads: "Gaming activity is permitted in New Mexico only if it is conducted in compliance with…the Gaming Control Act or a state or federal law …that expressly permits the activity…." NMSA 1978, § 60-2E-4 (1997). See also State ex rel. New Mexico Gaming Control Bd., 2005-NMCA-117, ¶ 7 (gaming "is illegal in New Mexico" unless allowed by state or federal law).

The current Compacts make it unlikely that the legislature will enact a law permitting horse racetracks to engage in any and all types of Class III gaming. The Compacts do not expressly prohibit the legislature from expanding the types of Class III gaming

conducted at horse racetracks beyond that currently authorized by law. However, the Compacts provide that if the state attempts such an expansion, the gaming tribes' obligation to make revenue-sharing payments shall terminate. See 2001 and 2007 Compacts, § 11. There is no exception in the Compacts or state law authorizing a horse racetrack that submits to revenue sharing to conduct Class III gaming to the same extent as the gaming tribes.

Class II Gaming Activities at Horse Racetracks

As discussed above, IGRA divides gaming activities conducted by tribes on Indian lands into three categories and permits a tribe to engage in one of those gaming categories – Class III gaming – only under a compact with the state. Consistent with IGRA, the current Compacts between New Mexico and the gaming tribes address only the tribes' Class III gaming activities and effectively limit Class III gaming activities by non-tribal entities.

Neither IGRA nor the Compacts affect the state legislature's authority to authorize or regulate Class II gaming activities outside of Indian lands. Consequently, if authorized by state law, a horse racetrack could engage in Class II gaming activities without violating the terms of the current Compacts. Similarly, legislation permitting horse racetracks to offer Class II gaming would not constitute a breach of the Compacts or terminate the gaming tribes' revenue-sharing obligations.

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[1] In general, "Indian lands" consist of "all lands within the limits of any Indian reservation" and lands "held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4).