STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL August 23, 2018	No. I18-010 (R17-007) Re: Historical Horse Race Wagering and Arizona's Indian Gaming Compact

To: David Cook
Arizona House of Representatives

Question Presented

Would permitting the delivery and regulation of pari-mutuel wagering at racetracks through the use of so-called "historic" horse race terminals jeopardize or violate Arizona's Indian Gaming Compact?

Summary Answer

Yes. Wagering on historic racing through the use of player terminals has been prohibited in Arizona since before May 1, 2002. Any change to Arizona's pre-May 1, 2002 gaming laws could cause one of the signatories to the Arizona Tribal-State Gaming Compact (the "Compact")[1] to initiate action under Compact section 3(h)(1), which would limit the State's

[1] The tribal compacts consist of contracts and multiple appendices agreed to by the State and each of twenty-two Arizona tribes, as approved by the U.S. Department of the Interior. A copy of the current compacts may be found at https://gaming.az.gov/law-compacts/tribal-state-

ability to regulate some aspects of tribal gaming and dramatically decrease the revenues the tribes must provide to the State. Accordingly, Arizona's Indian Gaming Compact could be in jeopardy if the State permits historic pari-mutuel wagering.

Analysis

I. The Tribal-State Compact

A. Indian Gaming Regulatory Act

In 1988, Congress passed the Indian Gaming Regulatory Act ("IGRA") to allow tribes to negotiate the division of power between themselves and the states with regard to gaming laws. IGRA 25 U.S.C. §§ 2701 to 2721 (2012). IGRA gives states a role in the development and regulation of Indian gaming occurring within their borders. *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092–93 (E.D. Cal. 2002).

The Act creates Class I, Class II and Class III divisions of gaming. Class I gaming is defined as 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 relates to bingo and certain card games that are legally played within a State, excluding banked card games and slot machines. 25 U.S.C. § 2703(7). Class III gaming is all gaming that is not Class I or Class II gaming. 25 U.S.C. § 2703(8).

Class III gaming 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 Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1027 (D. Ariz. 2001), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002); Compact, § 3(a).

---

compacts. Because the agreement with each tribe is essentially the same, the compacts are often referred to as the "Compact," in the singular.

Under the IGRA, States have the right to negotiate compacts with tribes to regulate Class III gaming within the State. 25 U.S.C. § 2710(d)(3)(C).

B. Arizona's Gaming Compact

Arizona's current Compact, outlined in Arizona Revised Statutes ("A.R.S.") § 5-601.02(I)(6), became effective in 2003 and was later amended in 2009. Arizona's Compact created "exclusivity covenants," which gave the tribes monopoly power over some gaming activities, while reserving others to the State. Compact § 3(h), (z). In exchange for their gaming monopoly, the tribes agreed to contribute a percentage of their "Net Win" to the State.[2] Compact § 12(b). The tribes also agreed to State regulation of their facilities, tables, devices, and wagering types. Compact § 3.

Arizona Revised Statutes § 13-3302 outlines gambling types that were legal as of May 1, 2002, including: (1) amusement gambling; (2) social gambling; (3) "gambling . . . conducted in accordance with the statutes, rules or orders governing the gambling"; and (4) "[g]ambling that is conducted at state, county, or district fairs, which complies with the provisions of § 13-3301, paragraph 1, subdivision (d)." A.R.S. § 13-3302(A)(1)–(4). The statute also allowed non-profit organizations to organize and implement raffles, subject to certain qualifications.

The State violates its exclusivity covenant if the Legislature permits a new type of gaming that was not legal prior to May 1, 2002. If the State is in violation of the covenant, Compact section 3(h)(1) provides that the tribes may be released from the Compact's limitations on gaming facilities, tables, devices, and table games. Additionally, they may reduce contributions to the State to seventy-five hundredths of one percent (.75%) of their Net Win.

---

[2] The annual Net Win contribution ranges from one to eight percent of the total Net Win, depending on the total amount. Compact § 12(b).

A violation of the exclusivity covenant does not automatically trigger the tribes' release from the Compact. Instead, tribal compact signatories are required to give written notice of the allegation that the State has violated Compact section 3(h)(1), and the party receiving the notice shall serve a written response on the complainant. If the parties cannot agree whether section 3(h)(1) has been triggered, they may engage in dispute resolution pursuant to Compact section 3(i).

As previously mentioned, any gaming that was legal prior to May 1, 2002 would not trigger Compact section 3(h). Thus, in order to answer your question regarding whether pari-mutuel wagering at racetracks through the use of historic race terminals could trigger Compact section 3(h), we must first consider whether A.R.S. § 13-3302 allowed pari-mutuel "historic racing" prior to May 1, 2002.

II. Historic Racing Under A.R.S. § 13-3302

A. Historic Racing Background

The term "historic racing" refers to the use of an electronic device or terminal (*e.g.*, a slot machine) to place bets on completed horse races in which the bettors do not know the outcome of the race. *Wyoming Downs Rodeo Events*, *LLC v. State,* 134 P.3d 1223, 1229-30 (Wyo. 2006). Historic racing is also known as "historical horse racing," "Instant Racing" (RaceTech, LLC's registered trademark for its patented system), "racing replay," or "replayed races." *Id.* at 1224-25; *Racetech, LLC v. Kentucky Downs, LLC*, 169 F. Supp. 3d 709, 711 (W.D. Ky. 2016); *State ex rel. Loontjer v. Gale*, 853 N.W.2d 494, 499-500 (Neb. 2014); Col. Rev. Stat. Ann. § 44-32-605 (2018)*; see also Wyoming Downs*, 134 P.3d at 1225 (historic racing also encompasses completed dog races). The Supreme Court of Kentucky has described historic racing 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 better [sic] to watch, or, as the name "Instant Racing" implies, 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.

Appalachian Racing, LLC v. Family Tr. Found. of Kentucky, Inc., 423 S.W.3d 726, 730 (Ky. 2014). The terminals also allow a player to make wagers on several races at the same time, as opposed to traditional horse wagering, which generally only allows bets on one race at a time. *State ex rel. Loontjer*, 853 N.W.2d at 500.

In *Appalachian Racing, LLC*, 423 S.W.3d at 736-38, the Kentucky Supreme Court held that historic racing was no different from horse racing in general, and was within the regulatory agency's power to approve, provided that all historic race wagering was, in fact, pari-mutuel. *Id.* However, the court held that because historic racing was not "live racing," the State could not collect taxes upon the historic racing handle. The court remanded the case to determine if the historic racing terminals qualified as pari-mutuel wagering and were, thus, exempt from Kentucky's penal code prohibitions against gambling. In 2015, the Kentucky legislature enacted provisions to legalize historic racing terminals to cure any remaining legal objections. Ky. Rev. Stat. Ann. § 528.010 (2018).

In addition to Kentucky, Alabama, Arkansas, Colorado, Idaho, Nebraska, Oregon, Texas and Wyoming have laws distinguishing ordinary pari-mutuel betting and betting on historic racing. *See* Colo. Rev. Stat. Ann. § 44-32-605 (2018) (prohibiting "racing replay[s] and wagering device[s]"); *Coeur D'Alene Tribe v. Denney*, 387 P.3d 761, 764 (Idaho 2015); *State ex rel. Loontjer,* 853 N.W.2d at 498; *Wyoming Downs Rodeo Events, LLC*, 134 P.3d at 1230

(finding that historic racing terminals are slot machines masquerading as horse races); *Texas Quarter Horse Ass'n v. Am. Legion Dep't of Texas*, 496 S.W.3d 175, 178 (Tex. App. 2016); Bennett Liebman, *Pari-Mutuels: What Do They Mean and What Is at Stake in the 21st Century?*, 27 Marq. Sports L. Rev. 45, 100 (2016). These States' experiences with the issue support the idea that pari-mutuel historic racing and regular horse racing are distinct.

B. A.R.S. § 13-3301 did not Permit Pari-Mutuel Historic Horse Racing as of May 1, 2002.

Joseph Oller invented the modern system of horse race wagering in Paris, France in the late nineteenth century. Bennett Liebman, *Pari-Mutuels: What Do They Mean and What Is at Stake in the 21st Century?*, 27 Marq. Sports L. Rev. at 62–79. The system, called the "Paris Mutuels," was universally adopted in the early twentieth century. *Id*. The Arizona Legislature approved pari-mutuel machines for managing racing bets in 1935. A.R.S. §§ 73-1601–1608 (1935). "All other forms of wagering or betting on the result of a horse race or dog race" were illegal. *O'Neil v. Arizona Horsemen's Ass'n*, 57 Ariz. 424, 427 (1941). Arizona's current horse racing rules do not encompass pari-mutuel historic racing.

Historic Racing is not "amusement gambling," "social gambling," "[g]ambling that is conducted at state, county or district fairs," or a raffle—*i.e.*, gambling activities permitted under § 13-3301 prior to May 1, 2002. A.R.S. § 13-3302. The remaining State-sanctioned gambling in § 13-3301 is referred to as other regulated gambling. Regulated gambling includes gaming "operated and controlled in accordance with a statute, rule or order of this state or of the United States." A.R.S. § 13-3301(6)(b)(i) (2002).

As of May 1, 2002, the State *did* permit some types of pari-mutuel horse race wagering. A.R.S. § 5-112(A) (2002). Bettors could place bets in a pari-mutuel pool as long as the wagers

were:[3] (1) confined to "the enclosure of a racing meeting held pursuant" to Title 5, Article 1 of the Arizona Revised Statutes (the "Racing Statutes"); (2) based on "the results of a race held at the meeting or televised to the racetrack enclosure by simulcasting[;]" and (3) conducted "by contributing money to a pari-mutuel pool operated by the permittee as provided" in the Racing Statutes.[4] *Id.*

The wagering was also required to be "conducted by a permittee" and specific percentages were to be deducted from the pari-mutuel pool prior to payment to the winning bettors to pay taxes, purses, and other statutorily-established obligations. A.R.S. § 5-111 (A)-(C) (2002). Finally, all remaining monies in the pari-mutuel pool had to be divided among the winning bettors. A.R.S. § 5-101(21) (2002).[5]

Although the question presented assumes that historic race wagering is pari-mutuel wagering, historic racing does not meet the aforementioned requirements. Some of the money generated would be provided to the actual owner/operator of the machine which would deprive the bettors of part of the benefit of the pari-mutuel pool after the takeout was deducted. Ariz. Admin. Code ("A.A.C.") R19-2-523(A)(1). Additionally, A.R.S. § 5-101 did not allow for deduction from the pari-mutuel handle or pool to pay a non-permittee third-party, such as a machine operator.

Moreover, in order to qualify as pari-mutuel wagering as it existed pre-May 1, 2002, the race must be held live and within a race enclosure. *See* Ariz. Op. Att'y Gen. No. I14-008 (2014) (the "2014 Opinion") (discussing the illegality of instant horse racing games under current gambling law). Historic races do not meet this criterion because they are not "held at the

[3] The current law is virtually identical to the May 1, 2002 law.
[4] There are, in fact, multiple pari-mutuel pools on any given race day, based on the type of wagers allowed, but for purposes of this opinion, the pools will be referred to in the singular.
[5] Currently, A.R.S. § 5-101(23).

meeting;" rather, they are held at some other track and the results are obtained at some other point in time.

Furthermore, the presentation of virtual historic races on terminals does not qualify as "simulcasting." As defined under Arizona law, "simulcasting" only involves audio and visual signals of "live" races. A.R.S. § 5-101(26) (2002). Even if the representation of historic races on terminals were simulcasts, terminal displays of more than one type of race were illegal as of May 1, 2002. A.R.S. § 5-112(B) (2002). Under § 5-112, "simulcasts shall be limited to the same type of racing as authorized in the permit for live racing conducted by the permittee." *Id.* (2002). Therefore, horse racing permittees could not receive simulcasts of dog races, and vice versa.

Finally, although historic race wagering is said to be "pari-mutuel," there is some debate about whether the system is actually equivalent to the pari-mutuel betting practiced in traditional racing. As of May 1, 2002, Arizona defined pari-mutuel wagering as "a system of betting which provides for the distribution among the winning patrons of at least the total amount wagered less the amount withheld under state law." A.R.S. § 5-101(21) (2002).

The Arizona Racing Commission has long prohibited pari-mutuel ticket sales on contests for which wagering has already closed. A.A.C. R19-2-504(B) (2002). Pari-mutuel historic betting appears to fit squarely within this prohibition. Thus, the State's long-running prohibition on this type of gaming is clear; it was illegal before 2002, and any attempts to legalize it could jeopardize Arizona's Gaming Compact.

Conclusion

In conclusion, because pari-mutuel historic race wagering was not legal at the time of the Compact, if Arizona allowed it, the tribal signatories to the Compact could initiate action under § 3(h)(1) to abrogate portions of the Compact.

Mark Brnovich
Attorney General