



STATE OF ARIZONA

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August 8, 1997

Gary A. Husk, Director
Arizona Department of Gaming
202 East Earll Drive, Suite 200
Phoenix, Arizona 85012

Re: I97-010 (R97-015)

Dear Director Husk:

You have requested an opinion to guide the Arizona Department of Gaming ("Department") in determining when gambling conducted for a direct or indirect benefit is unlawful under Arizona law. We conclude that, with certain limited exceptions, gambling operated as a business for benefit -- whether direct (such as an entrance fee, membership fee, dues, or a portion of a pot) or indirect (such as the use of gambling to attract food or beverage customers) -- is unlawful in Arizona and therefore not legal on Indian lands unless specifically authorized by a gaming compact or by statute.¹

Background

IGRA provides a federal statutory basis for a State's regulation of gaming by Indian Tribes. 25 U.S.C. § 2702; *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). The Department is responsible for monitoring and regulating all gaming on Indian lands pursuant to gaming compacts between the State of Arizona and various Indian Tribes. See A.R.S. §§ 5-601 through -604.

IGRA divides gaming into three classes. Class I gaming includes social games solely for prizes of minimum value or traditional forms of Indian gaming in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class II gaming includes bingo, games similar

¹ This opinion does not address Class III gaming (as defined in the federal Indian Gaming Regulatory Act ("IGRA")) conducted pursuant to a valid gaming compact executed pursuant to IGRA and Arizona Revised Statutes Annotated ("A.R.S.") § 5-601.

to bingo, non-banking card games² not illegal under the laws of the State, and card games actually operated in particular States prior to IGRA. 25 U.S.C. § 2703(7). Class III gaming encompasses all forms of gaming that are not Class I or Class II gaming, including such things as slot machines, casino games, banking card games, dog racing, and lotteries. 25 U.S.C. § 2703(8).

The distinction between classes of gaming is important in determining a State's regulatory power because IGRA prohibits Class III gaming on Indian lands unless there is a gaming compact negotiated between the Tribe and the State. However, Tribes may conduct Class II gaming on Indian lands without a gaming compact or State regulation. 25 U.S.C. § 2710(a)(2); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1041 (9th Cir. 1996). For a particular card game to constitute Class II gaming, which the State may not regulate, the game must be *both* a "non-banking" game and not illegal under State law. 25 U.S.C. § 2703(7). Thus, any card games illegal under Arizona law cannot constitute Class II gaming.

Analysis

Although your opinion request referred to the legality of card games, you asked that the opinion provide guidance on whether other types of gambling conducted at facilities at which food and beverage are sold is unlawful because of the benefit that may accrue to the operation. Accordingly, we note that while our analysis specifically focuses on determining whether card games would be legal under Arizona law, the analysis can be applied equally to other gambling activity to determine whether it would be legal in Arizona.

A. The General Statutory Framework

The State has the power to regulate or prohibit gambling. *State v. Gambling Equipment*, 45 Ariz. 112, 40 P.2d 746 (1935). "Gambling" means an

act of risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event but does not include bona fide business transactions which are valid under the law of contracts including contracts for the purchase or sale at a future date of securities or commodities, contracts of indemnity or guarantee and life, health or accident insurance. Gambling is conducted "as a business" when it is engaged in with the object of gain, benefit or advantage, either direct or indirect, realized or unrealized, but not when incidental to a bona fide social relationship.

² A "non-banking" game is one where players play against each other rather than the house (e.g., poker), whereas a "banking" card game is one where the players compete against the house and the house acts as banker (e.g., blackjack). See generally, S. Rep. No. 446, 100th Cong., 2nd Sess. 9, reprinted in 1988 U.S. Code Cong. & Admin. News 3071, 3079.

A.R.S. § 13-3301(3). Thus, it is unlawful for a person knowingly to obtain any benefit from gambling. *Id.* Indeed, all gambling is unlawful unless it falls within a statutory exclusion. See A.R.S. §§ 13-3301 to -3312; Ariz. Att'y Gen. Op. I90-035. Therefore, if particular conduct is determined to be gambling, it is illegal unless it satisfies all requirements of an exclusion.

The exclusions are listed in A.R.S. § 13-3302. Three of the six exclusions would not apply to card games conducted by Indian Tribes. Those exclusions permit gambling at State, county, or district fairs that satisfy other restrictions (A.R.S. § 13-3302(A)(4)), and allow raffles conducted by certain qualifying, non-profit organizations (A.R.S. § 13-3302(B)) or by certain State, county, or local historical societies (A.R.S. § 13-3302(C)). Therefore, the issue is whether card games not authorized by compact, yet conducted by and for the benefit of Indian Tribes at facilities that sell food and beverages as a business, could qualify for any of the three remaining statutory exclusions: "amusement," "regulated," or "social" gambling.

B. The "Amusement Gambling" Exclusion

"Amusement gambling" involves a gambling device, game, or contest that is played for entertainment and that satisfies all four elements in A.R.S. § 13-3301(1):

- (a) The player or players actively participate in the game or contest or with the device.
- (b) The outcome is not in the control to any material degree of any person other than the player or players.
- (c) The prizes are not offered as a lure to separate the player or players from their money.
- (d) Any of the following:
 - (i) No benefit is given to the player or players other than an immediate and unrecorded right to replay which is not exchangeable for value.
 - (ii) The gambling is an athletic event and no person other than the player or players derives a profit or chance of a profit from the money paid to gamble by the player or players.
 - (iii) The gambling is an intellectual contest or event, the money paid to gamble is part of an established purchase price for a product, no increment has been added to the price in connection with the gambling event and no drawing or lottery is held to determine the winner or winners.

- (iv) Skill and not chance is clearly the predominant factor in the game and the odds of winning the game based upon chance cannot be altered, provided the game complies with any licensing or regulatory requirements by the jurisdiction in which it is operated, no benefit for a single win is given to the player or players other than a merchandise prize which has a wholesale fair market value of less than four dollars or coupons which are redeemable only at the place of play and only for a merchandise prize which has a fair market value of less than four dollars and, regardless of the number of wins, no aggregate of coupons may be redeemed for a merchandise prize with a wholesale fair market value of greater than thirty-five dollars.

Card games might satisfy the first two elements of the amusement gambling exclusion (A.R.S. § 13-3301(1)(a) & (b)) if the players actively participate and the outcome is not controlled by any non-player. However, if the gaming facility receives any benefit from the players, the card games could not meet the third element (A.R.S. § 13-3301(1)(c)), which requires that prizes not be offered as a lure to separate the players from their money. *See* Ariz. Att'y Gen. Op. I87-101.³

Similarly, it is unlikely that card games could satisfy any of the categories in the fourth element of A.R.S. § 13-3301(1)(d). To satisfy the fourth element, the game must fit into one of these four categories: (i) the only benefit given to the player is an immediate and unrecorded right to replay; (ii) the game is an athletic event and only those athletes participating in the event derive a profit; (iii) the game is an "intellectual contest" registered with the Attorney General (A.R.S. § 13-3311) and nothing of value is paid to participate; or (iv) skill is the predominant factor, the award is a merchandise prize of less than \$4.00, and there is an aggregate limit of no more than \$35.00 in merchandise prizes per player.

When determining whether an activity constitutes amusement gambling, the Department must analyze all four elements of A.R.S. § 13-3301(1). If the Department finds that even one element is not satisfied -- for example if prizes are used as a lure to separate individuals from their money -- the activity does not satisfy the amusement gambling exception and is illegal gambling, unless another exclusion applies.

³ The Legislature adopted the "lure" element from *State v. American Holiday Association, Inc.*, 151 Ariz. 309, 311, 727 P.2d 804, 806 (App. 1985), in which the court of appeals focused on the "lure" feature in holding that a particular contest violated (A.R.S. § 13-3307(A), repealed and renumbered as A.R.S. § 13-3305), which forbids accepting wagers for a fee. Because American Holiday derived a chance of a profit from entrance fees paid by participants, the court held that the prizes were offered as a lure to separate individuals from their money for American Holiday's benefit. Although the Arizona Supreme Court later vacated the court of appeals' decision on other grounds, 151 Ariz. 312, 727 P.2d 807 (1986), the Legislature nevertheless codified the "lure" analysis in the current A.R.S. § 13-3301(1). Thus, if prizes are offered as a lure to separate individuals from their money, the activity cannot be "amusement gambling."

C. The "Regulated Gambling" Exclusion

"Regulated gambling" is defined as gambling that, among other things, is "operated and controlled in accordance with a statute, rule or order of this state or the United States." A.R.S. § 13-3301(5)(a). Legalized wagering on horse and dog races (A.R.S. § 5-112), the Arizona Lottery (A.R.S. § 5-504), and bingo (A.R.S. § 5-401) would constitute regulated gambling.

D. The "Social Gambling" Exclusion

If a gambling activity does not fall within the previously mentioned exclusions, the Department must still determine whether the activity can qualify as "social gambling." "Social gambling" is gambling that is not conducted as a business and involves players who compete on equal terms with each other in a gamble if all of the following apply:

- (a) No player receives, or becomes entitled to receive, any benefit, directly or indirectly, other than his winnings from the gamble.
- (b) No other person receives, or becomes entitled to receive any benefit, directly or indirectly, from the gambling activity including without limitation, benefits of proprietorship, management or unequal advantage or odds in a series of gambles.
- (c) None of the players are below the age of majority.
- (d) Players "compete on equal terms with each other in a gamble" when no player enjoys an advantage over any other player in the gamble under the conditions or rules of the game or contest.

A.R.S. § 13-3301(6).

Gambling will not satisfy the "social gambling" exclusion if it is a business -- that is, if it is operated with the object of gain, benefit, or advantage. A "benefit" includes anything of value or advantage, present or prospective (A.R.S. § 13-105(2)), and can be direct, such as taking a percentage of a pot, charging an entrance fee, or renting chairs or equipment to players, or indirect, such as using gambling to attract customers to a bar or restaurant. Indeed, the social gambling definition prohibits *any* non-player from receiving *any benefit*, directly or indirectly, from the gambling.⁴

⁴ The Legislature issued a forceful statement of findings and purpose with regard to social gambling in a recent amendment to the gambling statutes:

The "receipt of benefit" prohibition is intended to be applied broadly. For example, the prohibition against gambling that is "conducted as a business" in A.R.S. § 13-3301(6) is discussed in *State v. Takacs*, 169 Ariz. 392, 819 P.2d 978 (App. 1991). Takacs owned a bar and co-defendant Todd operated tables for games like poker and blackjack. In defense to the allegation that they were involved in illegal gambling, they argued that the language "conducted as a business" in A.R.S. § 13-3301(6) was unconstitutionally vague. The court disagreed. It noted that a person of average intelligence understands that an activity conducted as a business is one regularly conducted, with prescribed methods, to make a profit. So long as an operator or third person seeks a direct or indirect benefit through gambling, the activity is operated as a business and cannot qualify as social gambling.

State v. Duci, 151 Ariz. 263, 727 P.2d 316 (1986), demonstrates a direct benefit from gambling. The defendants organized a poker game, and took a portion of each pot. The defendants thus assured themselves of a profit regardless of who won each game. The *Duci* court's analysis shows that entrance fees, membership fees, or dues charged as a condition of gambling are direct benefits that would put a card game outside the definition of social gambling.

The benefit analysis also appears in *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1996), in which defendants leased video poker machines to others. Although leasing alone did not violate state law, the defendants also agreed to reimburse money their lessees paid to successful players when they traded in credits for replays or cash. The court held that the reimbursement arrangement implicated the lessors in unlawful gambling, because the defendants helped to induce the gambling and intended to derive a benefit from it. *Id.* The defendants did not directly participate in the actual gambling, but were held responsible because they obtained an indirect benefit from it through a ready market for their leased machines.

⁴(...continued)

A. The legislature finds that since the enactment of §§ 13-3301 through 13-3304, Arizona Revised Statutes, by Laws 1987, chapter 71, § 4, certain commercial establishments in this state have engaged in gambling that they are commonly promoting as "social gambling." Although "social gambling" is permitted by § 13-3302, Arizona Revised Statutes, the gambling that these commercial establishments are promoting does not fit within the statutory definition of "social gambling" declared by the legislature in § 13-3301, Arizona Revised Statutes. Therefore, such gambling is contrary to this state's public policy and is being conducted illegally.

B. Since the courts of this state have not consistently ruled that existing law prohibits the gambling activity that is being promoted as "social gambling," it is the purpose of this act to reassert and reaffirm for the courts and the public the legislature's original intent that such gambling is unlawful. In reasserting and reaffirming this original intent and in clarifying with this legislation certain provisions of § 13-3301, Arizona Revised Statutes, enacted originally by chapter 71, Laws 1987, the legislature has been guided by the advice and counsel of the department of law.

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We have also previously opined about how the social gambling "benefit" factor should be applied. *See* Ariz. Att'y Gen. Op. I91-024. In 1991, we evaluated a "shake-a-shift" game, which allowed a customer to purchase a roll of dice to win money in a jar if a particular result was achieved, and determined that it was unlawful gambling. We concluded "shake-a-shift" did not satisfy the social gambling exclusion because of the benefits received by the proprietor:

Although "shake-a-shift" meets many of the criteria for social gambling, it does not meet the criterion that "No other person receives, or becomes entitled to receive any benefit, directly or indirectly, from the gambling activity" The term "benefit" is defined as "anything of value or advantage, present or prospective." A.R.S. § 13-105(2). Even though the licensees apparently do not receive any percentage or portion of the money patrons place in the jar, they clearly benefit from having the gambling activity take place in their establishments. Patrons not only have the incentive to frequent the establishment to eat, drink, or socialize, they have the added incentive to frequent the establishment in order to gamble on a throw of "shake-a-shift" in the hopes of winning the jar of money kept at the establishment. Further, because patrons may play "shake-a-shift" only one time during a bartender's shift, they will also have the incentive to visit the establishment more frequently or to stay for extended periods of time, and thus spend more money at the establishment. Clearly, a proprietor obtains at least an indirect benefit from the gambling activity in question.

Ariz. Att'y Gen. Op. I91-024. The benefit can be as obvious as an entrance charge, membership fee, dues, rent, or a minimum purchase requirement (such as food or beverages). The benefit can also be less obvious, such as an increase in food and beverage sales. If any non-player receives any direct or indirect benefit from the gambling, it cannot be social gambling.

Conclusion

The analysis in this opinion should help to evaluate whether particular gambling is illegal under Arizona law. Except where specifically authorized by law, any gambling operated as a business, for direct or indirect benefit, is illegal. The key is the "benefit" concept. Use of such gambling to attract customers for otherwise-lawful activities such as food and beverage sales is also unlawful because it provides a benefit to the establishment.

Sincerely,



Grant Woods
Attorney General