



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

January 15, 2004

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative to Amend Idaho State Video Lottery Terminal Law

Dear Secretary of State Ysursa:

-An initiative petition was filed with your office on December 16, 2003. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

Initiated Legislation Is Equal To Legislative Enactments

The Idaho Constitution art. III, § 1, vests the legislative power of the state in the Senate and House of Representatives, and in the people through the initiative process. Laws passed by initiative are on equal footing with legislation enacted by the legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984).

In construing a law for both definitional and constitutional purposes, courts see no essential difference between measures enacted by initiative and referendum and those created through the usual legislative process. Neither is superior to the other, and are treated as equal in regard to their force, effect, and limitations. Thus, "*laws created by initiative or approved by referendum . . . must yield to the superior authority of the state or federal constitution . . . in any case of conflict.*" 2 Singer, Sutherland Statutory Construction § 36.05 (4th ed. 1986) (emphasis added). See also 42 Am.Jur.2d *Initiative and Referendum* § 6 (1969); 82 C.J.S. *Statutes* § 118 (1953); Annot., *Applicability of Constitutional Requirements as to Legislation or Constitutional Amendments, to Statutes or Constitutional Amendments Under Provision Conferring Initiative or Referendum Powers*, 62 A.L.R. 1349 (1929).

II. Exempting Certain Counties From Constitutional Prohibitions On Gambling Is Unconstitutional

The Constitution of the State of Idaho prohibits the passing of local or special laws on a host of topics, including crimes and misdemeanors:

The legislature **shall not pass** local or special laws in any of the following enumerated cases, that is to say: . . . For the punishments of crimes and misdemeanors.

Idaho Const. art. III, § 19 (emphasis added). A law "is not special when it treats all persons in similar situations alike," and it is not local "when it applies equally to all areas of the state." Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 429, 708 P.2d 147, 152 (1985). "A special law applies only to . . . a special locality," as opposed to all similarly situated localities. Bd. of County Comm'rs of Lemhi County v. Swensen, 80 Idaho 198, 201, 327 P.2d 361, 362 (1958) (quoting Ada County v. Wright, 60 Idaho 394, 403, 92 P.2d 134, 138 (1939)).

Although the court's formulation of this test over the years may have, at times, resembled that employed in the analysis under the equal protection clauses of the U.S. and Idaho Constitutions, Hanson v. De Coursey, 66 Idaho 631, 637, 166

P.2d 261, 263 (1946); the test for a local or special law remains a different analysis; the equal protection clause of the U.S. Constitution and Idaho Const. art. III, § 19, were adopted to serve distinctly different identifiable purposes.

While it might be constitutional in the sense of equal protection for our legislature to single out persons or corporations for preferred treatment, such would nevertheless be regarded as in conflict with art. III, § 19; Jones v. State Bd. of Med., 97 Idaho 859, 877, 555 P.2d 399, 417 (1976). The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable. Sun Valley Co., 109 Idaho at 429, 708 P.2d at 152; Kirkland v. Blaine County Med. Ctr., 134 Idaho 464, 469, 4 P.3d 1115, 1120 (2000); Jones v. Power County, 27 Idaho 656, 665, 150 P. 35, 37 (1915).

The initiative defines what constitutes an “eligible facility,” as follows:

(7) “Eligible facility” means a facility operated by a person licensed by the Idaho State Racing Commission to conduct live horse race meetings for not less than three of the last five years prior to 2004 in a county having a population of less than 100,000 in the 2000 US Census, where the facility is located in the county in which the licensed live horse race meetings have been conducted.

The Idaho State Video Lottery Terminal Law Initiative Petition, 2. Based upon this office’s research, there are eight (8) counties with horse racing facilities. But, only seven (7) counties appear eligible, because Ada County has a population in excess of 100,000. This law appears to further violate the prohibition against local legislation because it limits who can become eligible. According to the above cited definition, only those racing facilities which have conducted races in “three of the last five years prior to 2004” are eligible to conduct video lottery gaming. This makes it impossible for any other county to legally engage in the conduct that would be made legal in only seven counties, while still illegal in the balance of Idaho’s forty-four counties. As outlined above, a law, which makes legal in some places that which is illegal in other places would likely be construed by a court of competent jurisdiction as a local law and prohibited by the Idaho Constitution.

III. Gambling Is Expressly Prohibited In Idaho

Article III, § 20 of the Idaho Constitution states:

SECTION 20. GAMBLING PROHIBITED. (1) Gambling is contrary to public policy and is strictly prohibited except for the following:

- a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
- b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
- c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

(2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

(3) The legislature shall provide by law penalties for violations of this section.

(4) Notwithstanding the foregoing, the following are not gambling and are not prohibited by this section:

- a. Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; and
- b. Games that award only additional play.

Additionally, the Idaho Legislature enacted Idaho Code § 18-3801, which provides:

18-3801. Gambling defined.—"Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno, but does not include:

- (1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or
- (2) Bona fide business transactions which are valid under the law of contracts; or
- (3) Games that award only additional play; or

(4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or

(5) Other acts or transactions now or hereafter expressly authorized by law.

According to the Idaho Constitution, all forms of permissible gambling including, the Idaho Lottery and pari-mutuel betting are expressly prohibited from engaging in certain specified forms of gambling. The lottery is expressly prohibited from engaging in any gambling that takes on the following forms: blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

"Video lottery terminals" are simply another name for illegal "slot machines." If one were to call a game of 7-Card Stud "Go Fish," it would not make the game legal. The same analysis applies here.

Within the initiative petition, "Video Lottery Terminal" is defined as

(17) "Video Lottery Terminal" means a lottery machine, which is not activated by a handle or a lever, does not dispense coins, currency, tokens, or chips and performs only the following functions:

(a) Accepts currency, cash, coins, tokens, chips, vouchers, coupons, electronic cards or any other representative of value to qualify a player to participate in one or more games;

(b) Dispenses, at the player's request, a cash out ticket or electronic card that has printed physically or electronically, upon it the game identifier and the player's credit balance;

(c) Shows on a video screen or other electronic display, rather than on a paper ticket, the results of each game played;

(d) Shows on a video screen or other electronic display, in an area separate from the game results, the player's credit balance;

(e) Selects randomly, by a central computer, numbers or symbols to determine game results without use of any skill or judgment by the player; and

(f) Maintains the integrity of the operations of the terminal.

The Idaho State Video Lottery Terminal Law Initiative Petition, 3. Clearly this provision has been written to “technically” avoid classification as a slot machine. But this effort fails in many respects. Most importantly, the Idaho Supreme Court recently held that regardless of the technological changes made to a slot machine, it is still considered a slot machine and prohibited by both the Idaho Constitution and the Idaho Code. MDS Investments v. State of Idaho, 138 Idaho 456, *supra*, 65 P.3d 197 (2003).

Idaho Code § 18-3801 applies to slot machines “of any sort or kind whatsoever.” Slot machine technology is constantly evolving, which explains why the legislature intended the prohibition to apply to slot machines of “any sort or kind whatsoever.” Additionally, the Idaho Constitution prohibits “. . . any electronic or electromechanic imitation or simulation of **any form of casino gambling**.” Idaho Const. art. III, § 20 (2) (emphasis added). Generally, exclusively mechanical slot machines have been replaced by electrical or computer controlled machines, which determine the outcome based upon a “Random Number Generator.” As referred to in the initiative, the distinctions made regarding the absence of “levers or handles,” or that the outcome is selected “randomly by central computer,” do not operate to make the device described any less of a slot machine. If anything, it simply reflects the current trend in slot machine technology. Equally unconvincing is the distinction, which states that instead of money, the machine: “[d]ispenses, at the player’s request, a cash-out ticket or electronic card that has printed physically or electronically, upon it the game identifier and the player’s credit balance.” Currently, many casinos are incorporating “ticket in, ticket out” technology. Technological changes such as these are simply cosmetic.

Slot machines are defined by the Idaho Supreme Court as follows:

A slot machine is a gambling device which, upon payment by a player of required consideration in any form, may be played or operated, and which, upon being played or operated, may, solely by chance, deliver or entitle the player to receive something of value, with the outcome being shown by spinning reels or by a video or other representation of reels.

MDS Investments, 138 Idaho at 462, 65 P.3d at 203. As outlined within the initiative, the player pays to play, and then the machine, “selects randomly, by a

central computer, numbers or symbols to determine game results without use of any skill or judgment by the player” at which point, the player will either win additional credits or lose the credits played. Based upon the way that this initiative is crafted, it is likely that a reviewing court would find that the machines described are slot machines and expressly prohibited by the Idaho Constitution.

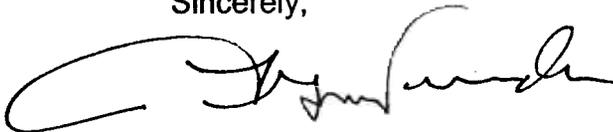
IV. Tribal Gaming Statutes Cannot Permit State Sanctioned Illegal Slot Machines

An anticipated argument is that the Tribal Gaming Compacts and recently passed initiative permits the installation of “video lottery terminals.” This is an incorrect assumption. Tribal gaming is regulated by a complex set of interrelated federal statutes, state statutes, tribal law, and tribal state compacts. A legal analysis of tribal gaming is far beyond the scope of this certificate of review. Distinct provisions of the law govern tribal gaming pursuant to a Compact and the prohibition on state operated slot machines.

CONCLUSION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Brent Baldwin by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lawrence G. Wasden', written over a horizontal line.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

LGW/bpk/ss