



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

May 1, 2007

*Via telefax to (208) 732-8822  
and U.S. Mail*

Mr. Fritz Wonderlich  
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Private Business's Operation of Tribal Video Gaming Machines

Dear Mr. Wonderlich:

**QUESTION PRESENTED**

Your letter of April 12, 2007, asked for an Attorney General's Opinion regarding unauthorized use of tribal video gaming machines. Your letter said:

I am the City Attorney for the City of Twin Falls. Our Police Department has discovered that a bar located in our city is operating tribal video gaming machines, as defined in Idaho Code § 67-429B(1)(a)-(f). These machines are obviously not being operated pursuant to a state-tribal gaming compact. I am unable to find a criminal penalty prescribed for unauthorized use of tribal video gaming machines.

Idaho Code § 18-3810 prohibits the possession or operation of slot machines in Idaho, and Idaho Code § 18-3802 prohibits gambling in Idaho, but 67-429B(2) provides that "Notwithstanding any other provision of Idaho law, a tribal video gaming machine as described in subsection (1) above is not a slot machine or an electronic or electromechanical imitation or simulation of any form of casino gambling."

Please advise if there is a legal method of criminally prosecuting the unauthorized possession and operation of tribal video gaming machines. Thank you for your help in this matter.

## CONCLUSION

There are no reported appellate cases on point in Idaho, but this office believes that you can prosecute this use of a tribal video gaming machine under the general statutes prohibiting gambling. There is no legal justification for treating these machines differently from any other gambling device operated by persons not authorized to operate them. Our analysis follows.

## ANALYSIS

### A. The Provisions of Idaho Law

The starting point is article III, § 20 of the Idaho Constitution, which sets forth the only kinds of gambling that can be legally conducted in Idaho and prohibits all others:

**§ 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.

As you can see from article III, § 20, there are only three kinds of gambling allowed in Idaho:

- (1) a State lottery (*i.e.*, a lottery run by the State and not by private persons),
- (2) pari-mutuel betting as authorized by law, see the Idaho Racing Act, Idaho Code §§ 54-2501, *et seq.*, which authorizes pari-mutuel betting at licensed racetracks, and
- (3) bingo and raffle games operated by qualified charitable organizations in pursuit of charitable purposes.

Under article III, § 20, there are two distinct elements to a legal gambling operation: (a) the operation must be of a kind of the gambling allowed by the constitution (a lottery, pari-mutuel betting, or bingo and raffles) and (2) the operation must be conducted by persons allowed by the constitution to conduct the particular kind of gambling (the State for a lottery, a licensed racetrack for pari-mutuel betting, and charities pursuing charitable purposes for bingo or raffles).

The gambling described in your letter—a tribal video gaming machine operated by a bar in the City of Twin Falls—does not fit into any of the allowed categories of (1) a lottery run by the State, (2) pari-mutuel racing run by a licensed racetrack, or (3) bingo or raffles operated by charities for charitable purposes.

The general Idaho criminal statutes that prohibit gambling therefore apply. In particular, Idaho Code §§ 18-3801 and 18-3802 apply. They provide:

**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.

**18-3802. Gambling prohibited.**—(1) A person is guilty of gambling if he:

- (a) Participates in gambling; or
  - (b) Knowingly permits any gambling to be played, conducted or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part.
- (2) Gambling is a misdemeanor.

In construing § 18-3801 the Idaho Supreme Court said that gambling consists of risking money or any other thing of value contingent upon lot or chance:

In the instant case, the issue decided by the district court . . . was whether playing the [video] machines constituted gambling as defined by Idaho Code § 18-3801. That statute states, “ ‘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.” All that is required is the risking of “any money, credit, deposit or other thing of value.” The district court correctly held that risking credits worth 5¢ each fit within the statute.

*MDS Investments, LLC v. State*, 138 Idaho 456, 464, 65 P.3d 197, 205 (2003). Presumably, the tribal video gaming devices at issue risk money for a chance at more gain, so they are gambling.<sup>1</sup>

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<sup>1</sup> *MDS Investments* also contains a definition of a slot machine in Part III.B of the opinion, 138 Idaho at 201-03, 65 P.3d at 459-61. The court does not say whether this definition is common law, which could be modified by statute, or constitutional, which could not be modified by statute. Thus, at this time it is impossible to know how the Tribal Gaming Initiative’s definition of tribal video gaming devices, see Idaho Code § 67-429B(1)(a)-(f), would be encompassed by or outside of the court’s definition of a slot machine and/or whether that definition has been or could be altered by statute. Those questions, which would run to the interpretation of Idaho’s Tribal-State Gaming Compacts, simply are not presented by or relevant to this guideline’s analysis of a Twin Falls bar owner’s using tribal video gaming machines.

In addition, depending upon how the particular tribal video gaming machine(s) at issue are mathematically configured for payouts to players, they may constitute a lottery or an electronic facsimile of a lottery, both of which are illegal under Idaho Code §§ 18-4901 through 18-4905,<sup>2</sup> which provide:

**§ 18-4901. Lottery defined.**—A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known. . . .

**§ 18-4902. Engaging in lottery.**—Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor.

**§ 18-4903. Traffic in lottery tickets.**—Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share or interest, or any paper, certificate or instrument, purporting, or understood to be, or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery, is guilty of a misdemeanor.

**§ 18-4904. Assisting in lottery.**—Every person who aids or assists, either by printing, writing, publishing, or otherwise, in setting up, managing or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, or in advertising an illegal lottery, is guilty of a misdemeanor.

**§ 18-4905. Maintaining lottery office.**—Every person who opens, sets up, or keeps by himself or any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or

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<sup>2</sup> Idaho Code § 67-7447 provides that neither title 18, chapter 38, nor title 18, chapter 49, apply to the operations of the Idaho State Lottery:

**§ 67-7447. Lawful activity.**—Chapters 38 and 49, Title 18, Idaho Code, or any other state or local law or regulation providing any penalty, disability, restriction, regulation or prohibition for the manufacture, transportation, storage, distribution, advertising, possession, or sale of any lottery tickets or shares or for the operation of any lottery game shall not apply to the tickets or shares of the state lottery established in this chapter.

This exemption for the Idaho State Lottery from the application of these criminal statutes would not exempt a bar owner who conducted his own lottery from these statutes.

who, by printing, writing or otherwise, advertises or publishes the setting up, opening or using of any such office, is guilty of a misdemeanor.

....

**§ 18-4907. Search, seizure, and confiscation.**—All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state. . . .

**§ 18-4908. Permitting premises to be used for lottery.**—Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

A prosecution under these sections specific to lotteries, however, might involve complicated issues of fact concerning what is or is not a lottery, so the general gambling statutes would seem to be an easier source of authority for prosecution.

## **B. Federal Law Concerning Gambling on Indian Reservations**

Article III, § 20, is not, however, the only pertinent law regarding gambling. Article III, § 20, is also subject to the overlay of federal law, particularly regarding federal reservations. Article XXI, § 19 of the Idaho Constitution recognizes the supremacy of federal jurisdiction over Indian lands:

**§ 19. . . . Disclaimer of title to Indian lands.**— . . . And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States, residing without the said state of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof. . . .

Article XXI, § 19, explicitly recognizes that Congress retains jurisdiction over federal lands within Idaho and in particular over Indian reservations within Idaho. Congress's authority over Indians on Indian reservations comes in part from the Commerce Clause, Article I, § 8, cl. 3, which provides: "Congress shall have the Power

. . . [¶] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Congress’s authority over Indians on Indian reservations also comes in part from the Property Clause, Article IV, § 3, cl. 2, which provides: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .” See *United States v. State*, 131 Idaho 468, 470, 959 P.2d 449, 451 (1998), quoting *Cappaert v. United States*, 426 U.S. 128, 138, 96 S. Ct. 2062, 2069, 48 L. Ed. 2d 523 (1976) (the Property Clause also applies to Indian reservations).

Congress has exercised its authority under the Commerce Clause and/or under the Property Clause in the Indian Gaming Regulatory Act (IGRA), Public Law 100-497, 102 Stat. 4267 (1988), and in particular 25 U.S.C. § 2710(d)(1), which provides that Indian tribes may offer on Indian lands any so-called Class III game<sup>3</sup> permitted to be offered under State law by any person, organization or entity once the Secretary of Interior has approved a Tribal-State Gaming Compact for the Class III games:

**(d) Class III gaming activities; authorization; revocation; Tribal-State compact**

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are —

(A) authorized by an ordinance or resolution that —

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

Thus, although the Idaho Constitution restricts the operation of a lottery to the State of Idaho, the operation of pari-mutuel betting to licensed racetracks, and the

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<sup>3</sup> IGRA separates gaming activities into three classes: Class III gaming is a catch-all category for all forms of gaming not placed in Class I or Class II gaming. See 25 U.S.C. § 2703(8). Class III games likely include the tribal video gaming machines.

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operation of bingo and lotteries to charitable organizations, IGRA provides that any Idaho tribe may offer such games if it has compacted with the State to do so. Such gaming is, however, limited to the Indian lands over which a compacted tribe has jurisdiction—which in Idaho is currently limited to the Kootenai, Coeur d'Alene, Nez Perce and Fort Hall (Bannock-Shoshone) Reservations.

A compacted Idaho tribe's right to operate a form of Class III gaming that can only be operated off-reservation by the State, by a licensed racetrack, or by a charitable organization does not give a non-tribal business operating on lands inside or outside an Indian reservation the authority to operate games that may lawfully be operated by a tribe on its own reservation. In other words, a tribe's right under Idaho Code § 67-429C to amend its Tribal-State Gaming Compact to operate tribal video gaming machines as defined in § 67-429B on its own reservation does not extend a similar right to others to operate tribal video gaming machines off reservation. Off-reservation bars are not authorized to operate tribal video gaming machines.

### **C. Classification of Tribal Video Gaming Machines**

Without inspecting the tribal video gaming machine(s) at issue, this office cannot state with certainty how the particular machine would be classified. One can safely assume that the tribal video gaming machines at issue would not be a pari-mutuel game offered by a licensed racetrack. That leaves only two other forms of gambling that may be legally operated off-reservation: lotteries and bingo/raffles games.

If the tribal video gaming device(s) at issue were lotteries or facsimiles of lotteries, off-reservation they can only be legally operated by the State of Idaho and not by a private bar. If the tribal video gaming device(s) at issue were bingo or raffles or facsimiles of bingo or raffles, off-reservation they can only be legally operated by qualified charitable organizations in the pursuit of charitable purposes and not by a privately owned bar. If the tribal video gaming machine(s) at issue were not lotteries, bingo or raffles or facsimiles of lotteries, bingo, or raffles, off-reservation they cannot legally be operated by anyone because State law only authorizes them for use by Indian tribes on Indian lands in accordance with the applicable Tribal-State Gaming Compact.

### **D. Conclusion**

While it may be helpful to classify the tribal video gaming machine(s) at issue among the various categories of gambling to understand the law, it is not necessary to classify them among the various categories of gambling to bring a prosecution. That is because it is illegal for a privately owned bar in Twin Falls to operate a tribal video

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gaming machine, regardless of which category of gambling it would fall into. We believe that it should be possible for you to prosecute under Idaho Code §§ 18-3801 and 18-3802.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael S. Gilmore". The signature is written in a cursive style with a large initial "M".

MICHAEL S. GILMORE

Deputy Attorney General

AttyGen\L71201ga