



MEMORANDUM

FROM: Jon Anderson, Esq.
Jason Crow, Esq.

DATE: April 18, 2012

RE: House Bill 1280 - Legal Summary

Colorado House Bill 12-1280 allows the Colorado Lottery Commission to authorize up to two lottery retailers to operate video-lottery terminals (VLTs) at a single location on Colorado's Western Slope. This memo summarizes why HB 12-1280 is constitutional under established principles of Colorado law.

VLTs Are a Lottery and Do Not Require a Statewide Vote Under Colorado Law

- 1) **1993 Formal Opinion 93-5** by Attorney General Gale Norton concluded that games of chance, such as slots, are lottery games while games of skill, such as poker, are controlled by the Colorado Limited Gaming Act Opinion.
- 2) **1994 Informal Attorney General Opinion** to Attorney General Ken Salazar specifically held that VLTs are a lottery that can be authorized by the Colorado Lottery Commission. (Attached as **Exhibit A**). The legal conclusion regarding VLTs could not have been more clear:

Question: "Whether the Colorado Lottery Commission may establish video lottery terminals under its authority to create new lottery games?"

Conclusion: "Yes. The Colorado Lottery Commission may establish new games such as video lottery terminals..."
- 3) **1999 Attorney General Memorandum** to Attorney General Ken Salazar conclusively confirmed the office's prior determinations regarding VLTs: "I conclude that the finding that the General Assembly may direct the State Lottery Division to use video lottery terminals for lottery games is correct." (attached as **Exhibit B**).
- 4) **Colorado Constitution.** Under the Colorado Constitution, the General Assembly has exclusive authority to expand "lottery" games. The Colorado Supreme Court has consistently held that all "games of chance" are a lottery. (*In re Interrogatories of the Governor Regarding the*

Sweepstakes Races Act, 196 Colo. 353 (1978)). Therefore, the General Assembly maintains exclusive jurisdiction to expand games of chance, such as VLTs. The Colorado Limited Gaming Act added slot machines as a new limited gaming activity but did not restrict or preempt the General Assembly's authority to implement games of chance, such as VLTs. In fact, the Limited Gaming Act does not even cite or reference the constitutional provisions authorizing the lottery.

HB 1280 is Not Special Legislation

- 1) **Legal Standard.** Article V, Section 25 of the Colorado Constitution restricts "Special Legislation" which has been defined as legislation that: 1) applies to a "class of one;" or 2) applies to a specific class without a reasonable justification. HB 1280 does not qualify under either category of Special Legislation.
- 2) **HB 1280 is Not Special Legislation Because It is Not Restricted to a Class of One.** HB 1280 allows any party operating a Class B Track to apply for a VLT license and provides that two licensees can operate at a single site. HB 1280, by the fact that it is open to multiple VLT licensees ensures that it could not be applied to a class of one.
- 3) **HB 1280 is Not Special Legislation Because It Provides a Reasonable Justification.** HB 1280 provides reasonable justification for connecting VLTs to horse racing. Without a secondary wagering activity, horse racing will not expand in Colorado and likely will restrict further. This trend will continue to hurt Colorado's agricultural and tourism industries.

Conclusion

VLTs are lottery-based on the fact that they are a game of chance. Lottery commissions in states such as Delaware, West Virginia, Rhode Island, South Dakota and Maryland operate VLTs. In Colorado, the law is clear that such games of chance qualify as a lottery and the Attorney General's Office has held that VLTs are a lottery not subject to the Colorado Limited Gaming Act. Any reading of the Limited Gaming Act to the contrary does not comport with Attorney General Opinions or established Colorado Supreme Court precedent.



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December 7, 1994

M E M O R A N D U M

TO: The Honorable Tom Norton
President of the Senate

THUR: Maurice Knalzer
Deputy Attorney General

FROM: Clifton D. Hyspher
Assistant Attorney General *CH*

RE: Video Lottery Terminals

This informal opinion is provided in response to your request of November 7, 1994, concerning the authority of the Colorado Lottery Commission to establish video lottery terminals. This opinion reflects the legal opinion of the author and is not to be construed as an official opinion of the Attorney General.

QUESTION

Whether the Colorado Lottery Commission may establish video lottery terminals under its authority to create new lottery games?

CONCLUSION

Yes. The Colorado Lottery Commission may establish new games, such as video lottery terminals, which satisfy the requirements of § 24-35-208(2)(a), C.R.S.

DISCUSSION

The Colorado Constitution, article XVIII, section 2, makes certain lotteries legal in Colorado. These legal "games of

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EXHIBIT A

chance' include a state-supervised lottery. Article XVIII, section 2, of the Colorado Constitution states:

(1) The general assembly shall have no power to authorize lotteries for any purpose, except that the conducting of such games of chance as provided in subsections (2) and (4) of this section shall be lawful on and after January 1, 1988, and the conducting of state-supervised lotteries pursuant to subsection (7) of this section shall be lawful on and after January 1, 1991.

Article XVIII, section 2, clause 7, of the Colorado Constitution delegates to the General Assembly express authority to "establish" the state-supervised lottery mentioned in clause 1. Article XVIII, section 2, clause 7, provides in relevant part:

(7) Any provision of this constitution to the contrary notwithstanding, the general assembly may establish a state-supervised lottery. * * *

The General Assembly in § 24-35-201 C.R.S., et. seq., establishes a state-supervised lottery for Colorado. As part of the lottery system, § 24-35-208 C.R.S., authorizes the Colorado Lottery Commission (the Commission) to:

(1) (a) Promulgate rules and regulations governing the establishment and operation of a state lottery,...

(2) (a) [Determine] the types of lotteries to be conducted, but no lottery conducted under this part 1 shall be based upon the game of chance commonly known as bingo, nor shall any lottery be conducted which depends upon the outcome of any athletic contest except races race at state licensed dog or horse tracks if approved by the Colorado racing commission.

Section 24-35-208 imposes only two specific exceptions to the Commission's authority to establish new lotteries. These exceptions, that the game may not be based upon bingo nor be dependent upon the outcome of athletic events, are the only limitations on the Commission's authority to choose how lotteries are to be conducted. Accordingly, the Commission is free to utilize modern technology, such as video terminals, as a mechanism for bringing the state lottery before the public. See Travel Insurance Exchange v. Home Insurance Company, 841 P.2d 394

(Colo. Ct. App. 1992), (express limitations contained in a statute are construed to be exclusive.)¹

Thus, § 24-35-208(2)(A), authorizes the Commission, at its discretion, to establish state lottery games which pass a three factor test. These three factors may be restated as follows:

- 1) The game must constitute a lottery.
- 2) The game must not be based on the game commonly known as bingo.
- 3) The game may not be dependent on the outcome of an athletic competition with two enumerated exceptions, state licensed dog or horse races upon approval of the Racing Commission.

Of the three factors which must be satisfied in determining whether a game may be established in the state lottery, we will assume for purposes of this opinion that only the determination of what constitutes a lottery is problematic.

In analyzing whether a game is a lottery for purposes of Colorado law, the Colorado Supreme Court stated:

Our cases have established that a lottery is present when consideration is paid for the opportunity to win a prize awarded by chance. (Citation omitted)

In re Interrogatories of Governor Regarding Sweepstakes Races
App, 886 P.2d 898, 899 (1978).

1. An important duty of the Commission is to insure the integrity of the state-supervised lottery. Section 24-35-208(1)(c) states that one of the duties of the Commission shall be:

To carry on continuous study and investigation of the lottery throughout the state for the purpose of ascertaining any defects in this part 2 or in the rules and regulations issued under part 2 whereby abuses in the administration and operation of the lottery or any evasion of this part 2 or the rules and regulations may arise or be practiced...

This section evidences the intent of the legislature that any programs implemented by the Commission be secure from "abuses in the administration and operation of the lottery." Thus, the Commission must insure that any lottery instituted by it must be secure from fraud and tampering. See, Hyman v. Kautsky, 784 P.2d 735 (Colo. 1989), (statutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme.)

Thus, in order for a game to constitute a lottery it must exhibit the elements of consideration, chance, and prize. See, Federal Communications Commission v. American Broadcasting Co., Inc., 347 U.S. 284, 84 L.Ed. 698, 706, 74 S.Ct. 593 (1953) (there are three essential elements of a lottery... (1) the distribution of prizes; (2) according to chance; (3) for a consideration.)

Consideration is defined as "something given as recompense, as payment or reward" Webster's Third New International Dictionary, p.484 (1971). A prize is "something offered or striven for in competition or in contests of chance; something that may be won by chance (as in a lottery)." Id. at p.1806.

The element of chance is less easily defined. In general, chance will be present where randomness and unpredictability dominate the game. See Id. at p.373. Some level of skill may be present in a lottery; in a lottery chance is the controlling factor in the award. In re Interrogatories of Governor, at p.590.

The Commission may establish any video lottery terminal as part of the state-supervised lottery which fits within the parameters enunciated above.

April 19, 1999

INTRA OFFICE MEMORANDUM

TO: Ken Salazar
Attorney General

FROM: Maurice Knaizer *MK*
Deputy Attorney General

RE: Video Lottery Terminals

I have reviewed the informal opinion regarding video lottery terminals which was issued on December 4, 1994. I conclude that the finding that the General Assembly may direct the State Lottery Division to use video lottery terminals for lottery games is correct. Colo. Const. art. XVIII, § 2(7) authorized the General Assembly to establish a state-supervised lottery, "any provision of this constitution to the contrary notwithstanding," (emphasis added). Nothing in the State Constitution, including the Limited Gaming Amendment, Colo. Const. art. XVIII, § 9, restricts this power. If the proponents of the Limited Gaming Amendment had intended to limit this power, they could have amended § 2(7) or added specific language to § 9.

In addition, § 2(7) and § (9) address different types of gambling conducted by different types of entities. Section 2(7) gives the General Assembly broad authority to define state-sponsored lottery games, including the types of games and the places where the games may be conducted by the State. Section 9, the Limited Gaming Amendment, addresses gambling conducted by private interests. Private owners of gambling casinos may conduct only certain types of games, which are limited in wager amounts, in three jurisdictions within Colorado.

Finally, I have reviewed the Legislative Council's analysis of the Limited Gaming Amendment. Nothing in the analysis indicates that the proponents intended to limit the types of games conducted by the State Lottery Division or the means by which the games are conducted.

AG FILE: DOCUMENT#

EXHIBIT B

Question

Whether the general assembly, without referral to the people for a vote, may add video terminals to state-supervised lotteries and allocate a portion of the additional revenues to higher education?

Short answer: Yes.

Summary of analysis.

Discussion

The legislation proposed would allow video terminals (that look like electronic slot machines and are an electronic version of a scratch ticket) as a state-supervised lottery to be installed at the Mile High racetrack in Aurora and at an unspecified location in Pueblo. A portion of the additional revenue obtained from the video terminals would be allocated to higher education. The casinos in Central City, Black Hawk and Cripple Creek oppose the legislation, contending that the proposal violates the constitutional provision that allows limited gaming, including slot machines, in only the three historic mountain communities. This opinion concludes that proposed legislation is constitutional.

Background

1. State-supervised lotteries.

Effective January 1, 1981, Colorado voters approved "the conducting of state-supervised lotteries." Colo. Const. art. 18, §2(1). Article 18, § 2(7) of the Colorado Constitution provides,

Any provision of this constitution to the contrary notwithstanding, the general assembly may establish a state-supervised lottery. Unless otherwise provided by statute, all proceeds from the lottery, after deduction of prizes and expenses, shall be allocated to the conservation trust fund of the state for distribution to municipalities and counties for park, recreation, and open space purposes.

The constitution left the design of any lottery and the allocation of the proceeds to the general assembly.

The general assembly defines "lottery" as

all lotteries created and operated pursuant to this part 2, including, without limitation, the game commonly known as 'lotto,' in which prizes are awarded on the basis of designated numbers conforming to numbers selected at random, electronically or otherwise, by or at the direction of the commission, and any multistate lottery or game that is authorized by a multistate agreement to which the division is party."

Colo. Rev. Stat. § 24-305-201(5).¹ In accord with the constitutional requirement of a state-supervised lottery, "management of the lottery and control over the operation of its games shall remain with the state." Colo. Rev. Stat. § 24-35-204.5(1)(a). Thus, the Colorado lottery commission determines the types of lotteries to be conducted, Colo. Rev. Stat. § 24-35-208(2)(a), and the executive director of the department of revenue enters into contracts "for materials, equipment, and supplies to be used in the operation of the lottery" and "for the design and installation of games or lotteries." Colo. Rev. Stat. § 24-35-204.5(1)(a). The general assembly also declared that the state lottery division and the Colorado lottery commission "shall constitute an enterprise for the purposes of section 20 or article X of the state constitution," thus exempting the lottery from the restrictions in TABOR. Colo. Rev. Stat. § 24-35-202(1)(b).

The director of the state lottery division licenses agents to sell lottery tickets, and the lottery commission by rule determines the "manner and amount of compensation, if any, to be paid licensed sales agents necessary to provide for

¹ Case law defines a "lottery" as "when consideration is paid for the opportunity to win a prize awarded by chance." In re Interrogatories of Governor Regarding Sweepstakes Races Act, 585 P.2d 595, 598 (Colo. 1978).

the adequate availability of tickets or shares to prospective buyers and for the convenience of the public. Colo. Rev. Stat. §§ 24-35-206 and -208(2)(h). The commission by rule determines the price of lottery tickets and the numbers, sizes, and payment of the prizes on winning tickets. Colo. Rev. Stat. § 24-35-208(b) and (c). Total disbursements for lottery prizes "shall be no less than fifty percent of the total revenue accruing from the sale of lottery tickets or shares." Colo. Rev. Stat. § 24-35-210. The state collects the revenue from the sales: in fiscal year 2009, the lottery returned more than \$119.6 million to the state. <http://www.coloradolottery.com/index.cfm/ID/69>.

The general assembly initially allocated lottery proceeds 40% to the Conservation Trust Fund, 10% to the Colorado Division of Parks and Recreation and 50% to the General Fund.² Effective January 14, 1993, Colorado voters limited the general assembly's discretion to allocate lottery proceeds: after distribution of 40% to the Conservation Trust Fund and 10% to the division of parks and recreation, all remaining net proceeds go to the Great Outdoors Colorado Trust Fund ("GoCo"). Colo. Const. art. 27, §3. In any fiscal year when the net proceeds exceed \$35 million, to be adjusted each year for changes from the 1992 consumer price index (in 2010, the adjusted amount was about \$56 million), the excess is allocated to the general fund. *Id.*; Great Outdoors Colorado, http://goco.org.s57353.gridserver.com/?page_id=44. A statute referred by the general assembly to the voters in 2000 approved multistate lottery

² An example of legislative approval of lottery proceeds' use for something other than conservation or parks and recreation was the approval of bond financing for additional state correctional facilities, approved at the same time as electronic lotto. Sec. 1 of Laws 1990, H.B. 90-1323.

games and transferred a portion of the net proceeds from all lottery programs, including multistate lottery games, (if there is a spill-over to the general fund) to the state public school fund to assist in the repair of school buildings in poorer school districts. Sec. 8 of Laws 2000, Ch. 390 (Colo. Rev. Stat. § 24-35-201(5) and (6)).

The proposed legislation would transfer a portion of the net proceeds from all lottery programs, including from the new video terminal locations, (if there is a spill-over to the general fund) to higher education.

2. Limited gaming.

Effective October 1, 1991, the voters approved "limited gaming" in Central City, Black Hawk and Cripple Creek. Colo. Const. art. 18, § 9. "Limited gaming" in casinos in those cities was initially "the use of slot machines and the card games of blackjack and poker, each game having a maximum single bet of five dollars." The Colorado limited gaming control commission licenses the casinos, Colo. Rev. Stat. § 12-47.1-501(1)(b) and (c), and the casinos pay state taxes on their adjusted gross proceeds (the total amount of all wagers made by players less all payments to them).

The commission establishes annually the percentage paid by the casinos into the limited gaming fund. Colo. Const. art. 18, § 5(a). Each licensee that conducts limited gaming was to pay into the state's limited gaming fund "[u]p to a maximum of forty percent of the adjusted gross proceeds ... for the privilege of conducting limited gaming." Colo. Const. art. 18, § 9(5)(a). After payment of the commission's expenses, the state treasurer transfers the balance in the fund as

follows: 50% to the state general fund or such other fund as the general assembly provides; 28% to the state historical fund; 12% to Gilpin and Teller counties in proportion to the gaming revenues generated in each county; and 10% to Central City, Black Hawk and Cripple Creek in proportion to the gaming revenues generated in each city. Colo. Const. art. 18, § 5(b).

In November 2008, Colorado voters approved an expansion of limited gaming: if the voters of each city allow single bets of up to one hundred dollars and allow roulette and/or craps, tax revenues attributable to the expansion are deposited in the state limited gaming fund. Colo. Const. art. 18, § 9(7). After payment of the commission's expenses, the increase in revenues is distributed 78% to community colleges for student financial aid and classroom instruction; 10% to local governments (based on the proportion of gaming revenues attributable to the expansion of gaming that are paid by licensees operating in each city); and 12% to Gilpin and Teller counties (also distributed proportionally).

Id. Because all the cities increased the limits on gaming, the commission is forbidden from increasing the percentage paid to the state without a statewide election. Colo. Const. art. 18, § 9(d) and (e). [This information may be relevant to discussion of hold harmless]

Since 2008, the commission has set the tax as follows: if the annual adjusted gross proceeds are up to and including \$2,000,000, the tax is .25%; over \$2,000,000 to \$5,000,000, 2%; over \$5,000,000 to \$8,000,000, 9%; over \$8,000,000 to \$10,000,000, 11%; over \$10,000,000 to \$13,000,000, 16%; and over \$13,000,000, 20%. Thus, the maximum limited gaming tax imposed by

Colo. Rev. Stat. § 12-47.1-601 is 20%, rather than the 40% originally allowed by the constitution. In fiscal year 2010, limited gaming paid the state \$110,809,510 in tax revenues. 2010 Annual Report, Colorado Div. of Gaming.

The constitution defines "slot machine" as

"any mechanical, electrical, video, electronic, or other device, contrivance, or machine, which, after insertion of a coin ... or upon payment of any required consideration ... is available to be played or operated, and which, whether by reason of the skill of the player or application of the element of chance, or both, may deliver or entitle the player ... to receive cash ... or any other thing of value other than unredeemable free games, whether the payoff is made automatically from the machines or in any other manner.

Colo. Const. art. 18, § 9(4)(c). The general assembly defined "gaming device" or "gaming equipment" as "any equipment or mechanical, electromechanical, or electronic contrivance, component, or machine used remotely or directly in connection with gaming or any game." Colo. Rev. Stat. § 12-47.1-103(10). The general assembly defined "limited card games and slot machines," "limited gaming," or "gaming" as meaning "slot machines, craps, roulette, and the card games of poker and blackjack," each limited under the law to having "a maximum single bet of one hundred dollars." Colo. Rev. Stat. § 12-47.1-103.

Analysis

The general assembly, without referral to the people for a vote, may add video terminals to state-supervised lotteries and allocate a portion of the additional revenues to higher education.

The proposed legislation would allow video terminals that look like electronic slot machines as a state-supervised lottery at designated places in Aurora and Pueblo. Lotteries may be conducted anywhere in the state. The lottery commission by rule determines, *inter alia*, the types of lotteries to be

conducted, the manner of selecting the winning tickets or shares, the number and size of prizes, and the types of locations at which tickets or shares may be sold. Colo. Rev. Stat. § 24-35-208(2)(a),(c),(d) and (f). Given the authority delegated by the general assembly to the lottery director and the commission, the approval of video terminal lotteries at designated locations in Aurora and Pueblo does not require legislation. See Memorandum to Senator Tom Norton from State Dept. of Law, Dec. 7, 1994.

Certainly, if the director and the commission can approve the location and type of lotteries, the legislature can direct them to make the same determination without a vote of the people. See Attorney General Intraoffice Memorandum, April 19, 1999. Nothing in the constitution, including the limited gaming amendment, restricts the power of the general assembly to direct the lottery director or commission to allow video lottery terminals for lottery games. Id.

A primary reason for allowing decisions to be made about lotteries at the legislative and administrative level is that the state directly supervises the lottery. In contrast, the constitutional limitation on the location of limited gaming reflects that the casinos are owned and operated by private entities that make many of the decisions about the design of games and their payouts, decisions that are made by the state for lotteries.

The constitutional provisions creating the lottery and limited gaming both allow games of chance played on video terminals that may resemble slot machines. The constitution allows the general assembly to establish a state-supervised lottery. Colo. Const. art. 18, § 2(7). The statutory definition of

"lottery" includes all lotteries created and operated by the commission, including "lotto," in which prizes are awarded on the basis of designated numbers conforming to numbers selected at random, electronically or otherwise, by or at the direction of the commission." The only exceptions to the commission's authority to establish new lotteries are that the game not be based on bingo nor dependent on the outcome of athletic events. Colo. Rev. Stat. § 24-35-208. The constitution defines "slot machine" to include a video device that by chance may entitle a player to receive cash. Colo. Const. art. 18, § 9(4)(c). There is nothing exclusive about the definition in either constitutional provision that prevents the use of video terminals both as a lottery and as a form of limited gaming.

Finally, under the constitution, article 18, section 2(7), the general assembly may specify the expenditure of lottery proceeds that are not constitutionally restricted by article 27, section 3 (monies must go to the Conservation Trust Fund, the division of parks and recreation and the Great Outdoors Colorado Trust Fund). Moreover, because the state-supervised lottery is an "enterprise," it is exempt from the voter approval requirements of TABOR. [Finish when have draft legislation; wait for draft to discuss hold harmless provisions]