JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney General

DANIEL D. DOMENICO
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

FORMAL OPINION	)	No. 13-01
OF	)	AG Alpha No. GA AD AGBDV
JOHN W. SUTHERS Attorney General	)	July 19, 2013

This opinion, requested by the Colorado Department of Revenue, Division of Gaming, concerns distribution of moneys from the Limited Gaming Fund to the state's district attorneys.

QUESTION PRESENTED AND ANSWER

Question: Are the state's district attorneys entitled to receive off-the-top, pre-distribution money from the Limited Gaming Fund pursuant to Article XVIII, section 9(5)(b)(I) of the Colorado Constitution and Section 12-47.1-701(1), C.R.S. (2012) of the Colorado Limited Gaming Act for the purpose of covering expenses associated with gaming-related criminal offenses?

Answer: No. Neither the constitution nor any Colorado statute authorizes the state's district attorneys to receive priority off-the-top, pre-distribution Limited Gaming Fund money because they do not administer Section 9 of the constitution or the Gaming Act. District attorney expenses incurred in the prosecution of illegal acts related to limited gaming operations may be paid either through the direct constitutional distributions to the host counties or reimbursement from the Local Government Limited Gaming Impact Fund.

BACKGROUND

I. Section 9 and Limited Gaming Fund distributions.

Article XVIII, Section 9 of the Colorado Constitution ("Section 9"), approved by the voters on November 6, 1990, authorizes limited gaming within Central City, Black Hawk

and Cripple Creek, Colorado. Through Section 9, the voters explicitly prescribed the funding mechanism and the formula to be used in distributing limited gaming revenue.

First, Section 9 created in the state Treasury a Limited Gaming Fund ("Fund") into which all casino licensing fees and up to forty percent of the gross proceeds generated from limited gaming were to be paid. § 9(5)(a).

Section 9 then granted constitutional priority to "[a]ll ongoing expenses of the commission and any other state agency, related to the administration of this [Section 9]" and required payment of these expenses from the Fund prior to any distribution to named recipients under the constitutional formula. §9(5)(b)(I). Such payments are referred to as "off-the-top" distributions or payments.

After subtracting the off-the-top payments, the Treasurer distributes the remaining Fund balance (less two months of ongoing administrative expenses) according to the following explicit formula set forth in the constitution:

> [F]ifty percent shall be transferred to the state general fund or such other fund as the general assembly shall provide; twenty-eight percent shall be transferred to the state historical fund, which fund is hereby created in the state treasury; twelve percent shall be distributed to the governing bodies of Gilpin county and Teller county in proportion to the gaming revenues generated in each county; the remaining ten percent shall be distributed to the governing bodies of the cities of: the City of Central, the City of Black Hawk, and the City of Cripple Creek in proportion to the gaming revenues generated in each respective city. Section 9(5)(b)(II).

Distributions under this formula are known as "constitutional distributions."

On November 4, 2008, Colorado voters approved Amendment 50, which authorized expanded gaming hours, new games, and a $100 bet limit and created the Extended Limited Gaming Fund ("Extended Fund"). *See* § 9(7). Section 9(7) continues the same Fund distribution principles. That is, gaming tax revenues attributable to Section 9(7) are to be distributed first for off-the-top payments covering expenses of "the commission and other state agencies that are related to the administration of" Section 9(7), and then for constitutional distributions.[1] *See* § 9(7)(c)(I), (II) and (III).

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[1] Note that the constitutional distributions from the Extended Fund revenues differ from those from the Fund. As relevant here, Amendment 50 constitutional distributions include ten percent to the governing bodies of the cities of Central City, Black Hawk and Cripple Creek to address local gaming impacts, and twelve percent to the governing

II. Implementation of Section 9.

The Colorado Limited Gaming Control Commission ("Commission") is charged with "administration and regulation of" Section 9. § 9(2). The Limited Gaming Act of 1991 ("Gaming Act"), the implementing legislation adopted after the passage of Section 9, created the Colorado Division of Gaming ("Division") and placed it and the Commission under the Colorado Department of Revenue ("Department"). § 12-47.1-201, C.R.S. (2012); *see also* § 12-47.1-101, C.R.S. (2012).

To facilitate constitutional distributions, the original Gaming Act established a Contiguous County Limited Gaming Impact Fund ("Contiguous County Fund"). The Contiguous County Fund received a portion of the fifty percent constitutional distribution—not an off-the-top distribution—designated for "the state's general fund or such other fund as the General Assembly shall provide" under Section 9(5)(b)(II) (the "fifty percent constitutional distribution"). *See* § 12-47.1-1401, C.R.S. (1991); *see also* § 9(5)(b)(II). The purpose of the Contiguous County Fund was to address unreimbursed impacts resulting from limited gaming in those counties adjacent to the gaming host counties of Teller and Gilpin. At the time, authorized reimbursable impacts under the Contiguous County Fund specifically included:

> A contiguous county's share of the cost of operating administering services, district court facilities, *and district attorney operations* which are shared by other contiguou[s] counties and the counties of Gilpin or Teller. § 12-47.1-1401(9)(a), C.R.S. (1991) (emphasis added).

Senate Bill 97-027 replaced the Contiguous County Fund with the Local Government Limited Gaming Impact Fund ("Local Government Fund"). The Local Government Fund, which remains in the Gaming Act today, also receives funding from the fifty percent constitutional distribution and provides discretionary monetary grants to eligible entities, including thirteen specific counties, based upon their documented limited gaming impacts. *See* §§12-47.1-1601(1)(a) and (4)(b), C.R.S. (2012); *see also*§12-47.1-701(2)(a)(II)(C), C.R.S. Various district attorneys' offices in the state routinely receive grants from this fund.

ANALYSIS

Section 9 authorizes priority, off-the-top payments only for "ongoing expenses of the [Gaming] commission and any other state agency, related to the administration of this section 9." § 9(5)(b)(I); *see also* § 9(7)(c)(I). That is, to be eligible for off-the-top

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bodies of Gilpin and Teller Counties to address limited gaming impacts. *See* §9(7)(c)(III)(B) and (C).

payments, the state's district attorneys must incur expenses related to the "administration" of Section 9 *and* must constitute "state agencies." *See also* §12-47.1-701(1)(a) and (b), C.R.S.

I. The expenses of the state's district attorneys are not incurred in the administration of Section 9 of the constitution or the Gaming Act.

Under Section 9, off-the-top payments are for "ongoing expenses of the commission and any other state agency, related to the administration of *this section 9*." Section 9(5)(b)(I) (emphasis added); *see also* Section (9)(7)(c)(I). These constitutional provisions are clarified through Part 7 of the Gaming Act, governing the Limited Gaming Fund. As to off-the-top funds, the Gaming Act provides:

> All expenses *of the division and the commission*, including the expenses of investigation and prosecution related to limited gaming, shall be paid from the fund. § 12-47.1-701(1)(a), C.R.S. ("Section 701(1)(a)") (emphasis added).

Next, the Gaming Act specifies that off-the-top payments are to cover:

> [A]ll ongoing expenses of the commission, the department, the division, *and any other state agency* from whom assistance related to the administration of [the Gaming Act] is requested by the commission, [division] director, or [department] executive director. § 12-47.1-701(1)(b)(I), C.R.S. ("Section 701(1)(b)") (emphasis added).

In Section 701(1)(a), the phrase "including the expenses of investigation and prosecution relating to limited gaming" modifies the phrase "expenses of the division and the commission." Other agencies are not included in this subsection.[2]

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[2] Notably, the Gaming Act does not limit its use of the term "prosecution" only to criminal contexts, further indicating that the phrase "expenses of investigation and prosecution" pertains to Division and Commission prosecutions only and not to district attorney prosecutions, which are solely criminal in nature. For example, Section 12-47.1-525(3), C.R.S. states, "[t]he civil penalties set forth in this section shall not be a bar to any criminal prosecution *or to any civil or administrative prosecution*." § 12-47.1-525(3), C.R.S. (2012) (emphasis added). The prosecution and investigation expenses allowed are therefore explicitly limited to the Commission's and Division's expenses.

By contrast, the very next subsection, Section 701(1)(b) governs off-the-top distributions not only to the Division and Commission, but also to "*any other state agency* from whom assistance *related to the administration of this article* is requested by" the Commission, the Division Director or the Department Executive Director. In this subsection, costs of prosecution are not mentioned. Had the General Assembly wished to include "costs of prosecution" as a permissible off-the-fund distribution to agencies outside the Division and Commission, it would have done so. *See Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 662 (Colo. 2011) (finding "statutory silence" to be significant where the General Assembly demonstrated it "knew how" to include provisions on topic).

Nor are a district attorney's activities within the scope of Section 701(1)(b). A district attorney's law enforcement duties are not incurred in the "administration" of Section 9 or the Gaming Act. While the state's district attorneys play an important role in enforcing and prosecuting crimes, including those crimes codified through the Gaming Act, enforcement and prosecution do not constitute "administration." Instead, district attorneys are required by law to prosecute criminal violations, regardless of their type or under what statutes the violations arise. Further, the Commission does not contract with district attorneys for services as it does with the Colorado Bureau of Investigations or the Colorado State Patrol. *See* 12-47.1-831(5), C.R.S. (2012).

Also supporting this conclusion is the contrast between sections 12-47.1-703 and 704, C.R.S. ("Section 703" and "Section 704"). Section 703 declares that the district attorneys of the respective judicial districts of the state "shall prosecute all violations of this article in the same manner as provided for other crimes and misdemeanors." Next, Section 704 clarifies that the Colorado Attorney General shall represent and advise the Division and Commission. §12-47.1-704, C.R.S. Section 704 expressly provides that the expenses of the Attorney General incurred in these responsibilities "shall be paid from the limited gaming fund." The contrast between these consecutive provisions again indicates that the district attorneys are not entitled to off-the-top funding.

Finally, it is significant that the Gaming Act has always provided an alternative remedy for unmet gaming-related fiscal impacts on district attorneys' offices. Initially, the General Assembly established the Contiguous County Fund, which expressly provided for reimbursement out of the constitutional distributions for district attorney operations. *See* § 12-47.1-1401(9)(a), C.R.S. (1991) (emphasis added). Later, the Contiguous County Fund was replaced with the Local Government Fund, from which the state's district attorneys are eligible to receive, and in fact do receive, funds to compensate them for their documented gaming impacts. *See* §12-47.1-1601, C.R.S. (2012).

While several of the state's district attorneys are clearly impacted by and face expenses associated with limited gaming, these impacts are not incurred through the

"administration" of the Gaming Act or Section 9 of the state constitution. Rather, these enforcement expenses are precisely the type of impact addressed by the Local Government Fund and other constitutional distributions.

II. The State's District Attorneys are entitled to constitutional distributions.

The fact that the state's district attorneys are not entitled to off-the-top funding under the Section 9 does not leave them without recourse. Gilpin and Teller Counties receive a constitutional distribution to help fund district attorney operations in those counties. *See* Sections 9(5)(b)(II) and 9(7)(c)(III)(C). In addition, the Local Government Fund annually receives a percentage of the state's fifty percent constitutional distribution, and Gilpin, Teller, and eleven other counties are eligible recipients. § 12-47.1-1601(4)(b)(I), C.R.S. (2012).

CONCLUSION

The state's district attorneys incur expenses related to the indirect impact of gaming, but these expenses are not related to the "administration" of limited gaming in Colorado. I therefore conclude that the state's district attorneys' offices are not entitled to off-the-top payments under Section 9. Instead, district attorneys may seek reimbursement for expenses related to the impact of limited gaming through the specifically delineated constitutional distributions, including the Local Government Fund.

Issued this 19th day of July, 2013.

JOHN W. SUTHERS
Colorado Attorney General