STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL December 30, 2014	No. I14-008 (R14-018) Re: Instant Wagering

To: William J. Walsh
Director, Arizona Department of Racing

Questions Presented

You requested an opinion on the following question pertaining to "Instant Racing," a form of gambling involving historic horseracing:

Does the Arizona Racing Commission ("ARC") or the Arizona Department of Racing ("ADOR") have authority under Arizona Revised Statutes ("A.R.S.") §§ 5-101 to -116 to adopt rules authorizing Instant Racing as a form of pari-mutuel wagering?

Summary Answer

No. Pari-mutuel wagering in the form of Instant Racing is a prohibited form of gambling under Arizona law.

Gambling is illegal under the Arizona Criminal Code, but the Code contains an exemption for regulated gambling. A.R.S. § 13-3302(A)(3). Under Title 5, chapter 1 of the

Arizona Revised Statutes, one form of lawful regulated gambling is pari-mutual wagering on the results of horse and dog races held at a racing meeting in Arizona or televised to a racetrack enclosure by simulcasting. Although the ARC and the ADOR have statutory authority to adopt rules governing the conduct of these activities, "Instant Racing" is neither a race held at a racing meeting in Arizona nor a race televised to a racetrack enclosure by simulcasting. Consequently, without a legislative change, the ARC and the ADOR lack the authority to adopt rules that would permit Instant Racing.

Background

"Instant Racing" is a patented wagering system consisting of self-service gaming machines connected to a central server. Racetech, LLC, an Arkansas limited liability company, holds the patent.[1] Instant Racing involves wagering on historical horse races that have occurred at racing venues throughout the United States. The patrons bet with each other, and the racetrack has no interest in the race's outcome, but takes a prescribed percentage of the total pool of wagers.

Instant Racing terminals resemble casino slot machines. Bettors insert money (or the equivalent credit) into the terminal to make a wager. The terminal then displays information regarding a historic race while concealing the race's location and date, as well as the horses and jockeys involved. The terminal provides bettors with past performance information on the race's participants (frequently referred to as the "Daily Racing Form"), and bettors may then handicap the race and place bets in a variety of categories. After placing a wager, a bettor has the option of viewing the entire race or only the stretch run on a video screen.

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[1] The description of "Instant Racing" in this opinion is based on Racetech, LLC, marketing materials and judicial opinions from various states. *See, e.g., MEC v. Or. Racing Comm'n*, 233 Or. App. 9, 16, 225 P.3d 41, 65 (App. 2009).

Analysis

The question is whether the ADOR and the ARC may promulgate rules authorizing and regulating Instant Racing. An administrative agency's enabling legislation provides both the source of and the limits on its rulemaking power. *Kennecott Copper Corp. v. Indus. Comm'n of Ariz.*, 115 Ariz. 184, 186, 564 P.2d 407, 409 (App. 1977) ("To otherwise operate would be an administrative usurpation of the constitutional authority of the legislature."); *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 177 Ariz. 526, 530, 869 P.2d 500, 504 (1994) (same). Consequently, "[t]here is no authority or power to create a rule or regulation out of harmony with the statutory grant." *Adams v. Indus. Comm'n*, 26 Ariz. App. 289, 290, 547 P.2d 1089, 1090 (1976), *rev'd on other grounds*, 113 Ariz. 294, 296, 552 P.2d 764, 766 (1976).

The Arizona Legislature establishes policy and enacts standards to guide agencies. *Haggard v. Indus. Comm'n*, 71 Ariz. 91, 101, 223 P.2d 915, 922 (1950); *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 206, 484 P.2d 619, 626 (1971). A statute that grants unlimited regulatory authority to an administrative agency, without any restraints or standards to direct the agency's action, offends the Arizona Constitution as an unlawful delegation of the Legislature's power. *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 114, 252 P.2d 87, 89 (1953) (stating that an overly general grant would allow an agency "to wander with no guide nor criterion, with no channel through which its powers may flow"). Because an agency's authority to regulate is necessarily confined to the statutory grant, the extent of the ARC's and the ADOR's authority to regulate horseracing is limited in turn to the forms of horseracing that Arizona statutes authorize.

The controlling legislation requires the ARC to "[p]repare and adopt complete rules to govern the racing meetings as may be required . . . to protect and promote public health, safety and the proper conduct of racing and pari-mutuel wagering and any other matter pertaining to the

proper conduct of racing within this state." A.R.S. § 5-104(A)(2). Subsection 5-104(U) provides that the ADOR "may adopt rules . . . to carry out the purposes of this article, ensure the safety and integrity of racing in this state and protect the public interest." Both provisions create the source of rulemaking power, but not in the same way. Whereas the latter provision expressly limits the grant of authority to rules that "carry out the purposes of this article" and thus incorporates legislative policy decisions expressed in the entire statutory scheme, the former lacks this express limitation. Nevertheless, pursuant to the authorities cited above, rules enacted pursuant to A.R.S. § 5-104(A)(2) may not be "out of harmony" with the remainder of Title 5, Article 1.

The remaining question is therefore whether ARC or ADOR rules that permit wagering on historic races would conflict with the existing statutory scheme governing pari-mutuel wagering, thereby precluding such rules. Title 5, Article 1 does not expressly permit pari-mutuel wagering on historic races and, by implication, therefore prohibits rules that would permit such activity. Wagering on the results of a horserace except as expressly authorized in Title 5, Article 1 is a crime.[2] A.R.S. § 5-112(J). Authority for wagering on historic races must therefore appear in Arizona law; the Legislature need not have expressly prohibited the activity because A.R.S. § 5-112(J) prohibits all activity that is not expressly authorized. There is no provision within Title 5, Article 1 that expressly refers to wagering on historic races. Accordingly, Arizona law prohibits wagering on historic races unless it fits within any broader existing provisions. As explained below, it does not. The ADOR and the ARC therefore may not adopt rules permitting and regulating the activity absent a legislative amendment.

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[2] Section 5-112(J) also cross-references Title 13, Chapter 33 (Arizona's criminal gambling code), which exempts "regulated gambling" pursuant to A.R.S. § 13-3302(A)(3). "[R]egulated gambling" includes horseracing as authorized by state law. *See id.;* A.R.S. § 13-3301(6)(b).

Section 5-112(A) authorizes gambling on horseracing as follows:

> [A]ny person within the enclosure of a racing meeting held pursuant to this article may wager on the results of a race held at the meeting *or televised to the racetrack enclosure by simulcasting* pursuant to this section by contributing money to a pari-mutuel pool operated by the permittee as provided by this article.

(Emphasis added.) A historic race cannot be "a race held at the meeting," so it must fall within the parameters of a race "televised to the racetrack enclosure by simulcasting" to be the subject of authorized pari-mutuel gambling. *Id.* Pursuant to A.R.S. § 5-101(26), "'[s]imulcast' means the telecast shown within this state *of live audio and visual signals* of horse . . . races conducted at an out-of-state track or the telecast shown outside this state of *live audio and visual signals* of horse . . . races originating within this state for the purpose of pari-mutuel wagering." (Emphasis added.) A rebroadcast of a historic race is not a "live audio and visual signal of horse races."

The term "live" controls the analysis. In the context of horserace simulcasting around the United States, audio and visual *signals* are necessarily "live" in that they are actively and presently transmitted from one location to another. There can be no "old" simulcast signals that were previously transmitted but not yet received at the track. The adjective "live" cannot reasonably be construed as referring to the quality of the "audio and visual *signal*," but must necessarily refer to the fact that the audio and visual signals are of a live horserace. An analogous circumstance is when a news broadcast states that it is "live." No one would construe that to mean that the *transmission* of the broadcast is via a live *signal*, but that the events depicted are not occurring simultaneously within the limits of technology at the scene and on one's viewing screen. *See Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 423 S.W. 3d 726, 740 (Ky. 2014)(stating that "[a]t least since the advent of motion pictures and television, no competent person reasonably versed in the English language can fail to

comprehend the meaning of the term "live" . . . . We are all familiar with its common use in phrases such as 'live testimony,' 'live performances,' 'live broadcasts,' and 'live music.' The ordinary speaker of English will not confuse those concepts with 'recordings of live testimony,' 'recordings of live performances,' and so on"). Notably, *Dictionary.com* defines "simulcast" as "a closed-circuit television broadcast of an event, as a horse race, *while it is taking place*." (http://dictionary.reference.com/browse/simulcast?s=t) (last accessed 10/31/2014) (emphasis supplied); s*ee also* Neb. Att'y Gen. Op. No. 10009 (Mar. 29, 2010) at 9 (citing this definition). Because the rebroadcast or replaying of a historic race does not fall within the definition of "simulcast" in A.R.S. § 5-112(J), wagering on a historic race is prohibited. In addition, because wagering on historic races is not permitted in Title 5, Article 1, it is not "regulated gambling" pursuant to A.R.S. §§ 13-3302(A)(3) and -3301(6)(b) and is therefore illegal. While A.R.S. § 5-112(A) states that "[a]ll forms of pari-mutuel wagering shall be allowed on [horseraces], whether or not televised by simulcasting," this provision cannot be construed to expand authorized gambling beyond its express limits in A.R.S. § 5-112(A) without rendering the latter provision irrelevant or immaterial. "It is a rule of construction that statutes In pari materia must be read and construed together and that all parts of the law on the same subject must be given effect, if possible." *Ariz. Gunnite Builders, Inc. v. Cont'l Cas. Co.*, 105 Ariz. 99, 101, 459 P.2d 724, 726 (1969).

A number of courts and state legislatures outside Arizona have addressed this issue and have expressly or impliedly reached the same conclusion. *See, e.g.*, HB 1162, 82nd Gen. Assemb., Reg. Sess. (Ark. 1999) (creating a new section of law for historic racing when it had a definition of "simulcast" very similar to Arizona's); HB 220, 62nd Leg., 1st Sess. (Idaho 2013) (same); *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 423 S.W. 3d 726, 740

(Ky. 2014) (holding that state law permitted wagering on historic races, but concluding that because the state could only tax live races or simulcasts—which has a definition very similar to that of Arizona—that the state could not tax historic races, which fit neither category); *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 977, 853 N.W.2d 494, 499 (Neb. 2014) (discussing wagering on historic races and impliedly concluding that it did not fit within Nebraska's definition of "simulcast."); Neb. Att'y Gen. Op. No. 10009 (Mar. 29, 2010) (same); *MEC v. Or. Racing Comm'n*, 233 Or. App. 9, 13, 225 P.3d 41, 64 (App. 2009) (holding that existing law prohibited historic racing despite a definition of "simulcast" very similar to Arizona's); HB 2613, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (creating a new section of law for historic races); *Wyo. Downs Rodeo Events, LLC v. State*, 134 P.3d 1223, 1227 (Wyo. 2006) (holding that wagering on historic races did not fit Wyoming's definition of "simulcast"). These interpretations of similar statutory provisions support the determination that Arizona law does not permit betting on historic races.

Conclusion

Gambling is illegal in Arizona except as expressly authorized. While horseracing is the subject of lawful "regulated gambling," the statutes governing horseracing do not authorize gambling on historic races and expressly prohibit any gambling that is not specifically authorized. Because the Department of Racing and the Arizona Racing Commission cannot adopt rules that conflict with the statutes that govern their conduct, they cannot authorize gambling on historic races by rule.

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