

ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General



Department of Justice
Joseph P. Mazurek Justice Bldg.
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

VOLUME 57

OPINION NO. 2

GAMBLING – “All forms of gambling are prohibited unless authorized by acts of the Legislature or by the people through initiative or referendum”;

STATUTORY CONSTRUCTION – When the Legislature has not defined a statutory term, courts consider the term to have its plain and ordinary meaning;

MONTANA CODE ANNOTATED – Title 23, chapter 4; sections 1-2-101, 23-4-101(14)(a), 23-4-101(15), 23-4-101(16), 23-4-203, 23-4-204(1), 23-4-301(1), 23-5-102, 23-5-112(13)(a), 23-5-151, 23-5-502, 23-5-603;

MONTANA CONSTITUTION of 1972 - Article III, section 9;

OPINIONS OF THE ATTORNEY GENERAL - 57 Op. Att’y Gen. No. 1 (2017), 43 Op. Att’y Gen. No. 39 (1989), 42 Op. Att’y Gen. No. 39 (1987).

HELD: Montana law does not authorize wagering on historical horseracing; therefore, it is prohibited in Montana.

November 16, 2017

President Scott Sales
P.O. Box 200500
Helena, MT 59220-0500

5200 Bostwick Road
Bozeman, MT 59715

Dear President Sales:

[P1] You have requested my opinion on a question which I have restated below:

Does Montana law authorize electronic-terminal wagering on historical horseracing events?

[P2] Historical horse races are those that took place in the past at approved horseracing facilities and are presented in the form of a video display on a terminal, at which

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MONTANA DEPARTMENT OF JUSTICE

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division
Gambling Control Division ★ Motor Vehicle Division ★ Information Technology Services Division ★ Central Services Division

individual wagerers may place bets. *See Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 423 S.W.3d 726, 730 (Ky. 2014). A key difference between historic racing and traditional parimutuel wagering on horse races is that in historic racing, the patron wagers on a previously run race. *See Wyoming Pari-Mutuel Commission Report* (available online at <http://parimutuel.state.wy.us/PDF/Documents/HistoricRacingGUIDEFINAL.pdf>). Historic races are selected from the vendor's video library of tens of thousands of past horse races.

[P3] Your opinion request indicates that a Florida company, Exacta Systems, has expressed interest in expanding its historical horseracing parimutuel self-wagering terminal business into Montana. Your request further indicates in-State interest in using such terminals to bring live racing back to Montana (however, the scope of your request, as well as this Opinion, are limited to historical racing). You have also provided two legal memoranda with your request.

[P4] In Montana, “[a]ll forms of gambling, lotteries, and gift enterprises are prohibited unless authorized by acts of the legislature or by the people through initiative or referendum.” Mont. Const. art. III, § 9; *see also* Mont. Code Ann. § 23-5-151 (“Except as specifically authorized by statute, all forms of public gambling, lotteries, and gift enterprises are prohibited.”). As observed by Attorney General Racicot, the Montana Legislature has mandated that gambling laws of Montana must be “strictly construed by the Department [of Justice] to allow only those types of gambling and gambling activity that are specifically and clearly allowed by law.” 43 Op. Att’y Gen. No. 39, 158 (1989) (quotations omitted). Attorney General Greeley likewise recognized that strict construction of gambling-related statutes is warranted because “the Montana Constitution, article III, section 9, as well as section 23-5-102, MCA, prohibit all forms of gambling except those specifically authorized by statute.” 42 Op. Att’y Gen. No. 39, 158 (1987).

[P5] As acknowledged in the Exacta Legal Memorandum submitted with your request, parimutuel wagering on horseracing is “gambling.” Paisley Memo. at sec. II(d) (May 10, 2017); *see also* Mont. Code Ann. § 23-5-112(13)(a) (defining “gambling” as “risking any money, credit, deposit, check, property, or other thing of value for a gain that is contingent in whole or in part upon lot, chance, or the operation of a gambling device or gambling enterprise”). Because wagering on horseracing events is a form of gambling, the issue presented is *not* whether the subject wagering method is disallowed or prohibited by Montana statute; rather, the proper inquiry is whether it is specifically authorized.

[P6] Subject to statutory restrictions such as licensing requirements, “[i]t is lawful to conduct live or simulcast race meets at a racetrack or simulcast facility or otherwise at any time during the week.” Mont. Code Ann. § 23-4-203. Montana law authorizes no other types of wagering on horse races. The electronic terminals used in historical horserace wagering are not authorized “video gambling machines” under Mont. Code Ann. § 23-5-603, because such machines include only bingo, poker, keno, video line, and multigame video gambling machines.

[P7] Thus, the issue is whether Mont. Code Ann. § 23-4-203’s authorization of “live or simulcast race meets” may properly be construed as authorizing historical horseracing wagering. The answer is no, because as explained below, the scope of statutorily authorized wagering on horse races is limited to *live* races on which wagers are placed before the race is run.

[P8] A “race meet” means racing of registered horses under the parimutuel system including simulcast races. Mont. Code Ann. § 23-4-101(14)(a). The definitions then add, “‘Racing’ means *live* racing” and “‘Simulcast’ means a *live* broadcast of an actual horserace.” Mont. Code Ann. §§ 23-4-101(15), (16) (emphasis added). The Montana Legislature has thus authorized only two kinds of horse races in Montana:

- Live horseracing and
- Live simulcast horseracing.

[P9] “Live,” however, is not defined in Title 23, chapter 4. Where, as here, the Legislature has not defined a statutory term, courts consider the term to have its plain and ordinary meaning; and dictionary definitions may be considered. In this context, “live” means: “of or involving a presentation . . . in which both the performers and the audience are physically present.” Merriam Webster’s Collegiate Dictionary 681 (10th ed. 1993). A “live” race, within the meaning of Mont. Code Ann. § 23-4-203, is a horserace at which the patron/bettor is physically present at the location and time of the race.

[P10] The relevant statutes unambiguously reflect a clear intent on the part of the Montana Legislature to authorize parimutuel wagering only with respect to “live” and “simulcast” horseracing occurring in real-time, to the exclusion of historical horseracing.

[P11] The first rule of statutory construction “is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Mont. Code Ann. § 1-2-101; *see also* 57 Op. Att’y Gen. No. 1

(2017). This principle is of particular significance here, in light of Montana's constitutional prohibition of all gambling unless specifically and clearly allowed by law. Mont. Const. art. III, § 9. Inclusion of historical horseracing as an approved form of gambling would be precisely the sort of "insert[ion of] what has been omitted" expressly proscribed by black letter law.

[P12] Consequently, I conclude that historical horserace wagering is not authorized under Title 23, chapter 4, or any other provision of Montana statutory law; therefore, it is prohibited and thus unlawful. Mont. Const. art. III, § 9; Mont. Code Ann. § 23-5-151; *see also* Mont. Code Ann. § 23-4-301(1) ("It is unlawful to make, report, record, or register a bet or wager on the result of a contest of speed, skill, or endurance of an animal, whether the contest is held within or outside this state, except under 23-5-502 [limited authorization of sports pools and sports tab games] or this chapter.").

[P13] My conclusion is further supported by Mont. Code Ann. § 23-4-204(1), which provides in relevant part:

For the purpose of encouraging the breeding in this state of valuable registered horses, at least one race each day at each race meet must be limited to horses bred in this state unless, in the board's judgment, there is an insufficient number of Montana-bred horses for the race.

[P14] Although not dispositive, the foregoing language demonstrates the Legislature's intent to generally mandate that every authorized race meet include Montana-bred horses. The technology involved in historic racing involves drawing from video archives of tens of thousands of previously run horse races, any of which could have taken place at a parimutuel facility anywhere in the United States. *See* Wyoming Pari-Mutuel Commission Report, *supra*. It is doubtful that any significant percentage of video-recorded races involve exclusively Montana-bred horses. Montana Code Annotated § 23-4-204(1) thus reflects a lack of legislative intent to authorize historical horserace wagering in Montana.

[P15] No type or form of wagering on historical horseraces is authorized by Montana law. Consequently, it is not necessary to address whether historical horseracing constitutes a true parimutuel system of wagering; and accordingly, I express no opinion in that regard.

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[P16] In sum, if historical horseracing is to become legal in Montana, our Constitution mandates that it must be so authorized, in clear and unambiguous terms, by an act of the Legislature or by the people through initiative or referendum. Mont. Const. art. III, § 9. This has not been done.

THEREFORE, IT IS MY OPINION:

Montana law does not authorize wagering on historical horseracing; therefore, it is prohibited in Montana.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. C. Fox', with a long horizontal stroke extending to the right.

TIMOTHY C. FOX
Attorney General

tcf/rc/jym