

## **N.D.A.G. Letter to LaDuke (June 6, 1990)**

June 6, 1990

Mr. Joe LaDuke  
Executive Director  
North Dakota Racing Commission  
Office of Attorney General  
State Capitol  
Bismarck, ND 58505

Dear Mr. LaDuke:

Thank you for your May 10, 1990, letter concerning whether the North Dakota Racing Commission has authority to modify, by rule or agreement, the betting takeout percentages set forth in N.D.C.C. § 53-06.2-11(1) and (2).

N.D.C.C. § 53-06.2-11(1) requires that twenty percent of the aggregate amount of the win, place, and show parimutuel pool be deducted for retention as expenses of the licensee, payments to the North Dakota Racing Commission for the application to the Purse and Breeders Funds, and tax payments to the State Treasurer.

N.D.C.C. § 53-06.2-11(2) retains a similar betting takeout except that twenty-five percent of bets placed will be deducted from "each daily double, quinella, exacta, trifecta, or other wager combining two or more horses for winning payoffs."

Pursuant to N.D.C.C. § 53-06.2-11(4), all remaining moneys must be retained in the parimutuel pool and paid to bettors holding winning tickets.

You have stated in your letter that Dakota Race Management, the service provider for the North Dakota simulcast system, has requested permission from the Racing Commission to commingle the North Dakota parimutuel with the Assiniboia Downs pool. Since the province of Manitoba has different takeout percentages, a request is made that the North Dakota Racing Commission modify the takeout percentages of N.D.C.C. § 53-06.2-11 to equalize the takeout of the Assiniboia Downs pool. Dakota Race Management contends that N.D.C.C. § 53-06.2-10.1 authorizes this action by permitting the Commission to adopt interim standards or rules modifying the takeout percentage. N.D.C.C. § 53-06.2-10.1 provides:

Off track wagering. In addition to racing under the certificate system, as authorized by this chapter, and conducted upon the premises of a racetrack, off track parimutuel wagering may be conducted in accordance with this chapter and interim standards that need not comply with chapter 28-32, or rules adopted by the commission under this chapter. Any organization qualified under section 53-06.2-06 to conduct racing may make written

application to the commission for the conduct of off track parimutuel wagering on races held at licensed race courses inside the state or race courses outside the state, or both.

The North Dakota Racing Commission is an administrative agency and, as such, has authority to adopt rules governing the conduct of racing in North Dakota. N.D.C.C. §§ 53-06.2-04, 05.

The Legislature may delegate to a board or agency the power of administration in order to carry the legislative will into effect. State ex rel. Syvertson v. Jones, 23 N.W.2d 54 (N.D. 1946). However, the legislative power of the government is vested exclusively in the Legislature. The Legislature cannot delegate that power to any other body. It is a basic rule of administrative law that administrative regulations which go beyond what Legislature has authorized are void. Medical Properties, Inc. v. North Dakota Board of Pharmacy, 80 N.W.2d 87 (N.D. 1956). An administrative regulation may not exceed statutory authority or supersede a statute. Permitting an administrative agency to promulgate rules which include substantive matters not included in the statute under which it is acting constitutes an improper delegation of legislative power. Moore v. North Dakota Workmen's Compensation Bureau, 374 N.W.2d 71 (N.D. 1985).

Based upon these decisions and general principles of administrative law, an administrative agency is permitted to implement and administer laws, but cannot create laws. The North Dakota Legislature specifically set forth the takeout percentages permitted to be deducted from parimutuel or other race betting. These takeout percentages, whether twenty percent or twenty-five percent, have been specifically established by the legislative assembly with a clear mandate that the balance of the betting pools be retained by the licensee and returned to the bettors. Any increase in the takeout percentages would result in a decrease in the amount of money available to bettors. N.D.C.C. § 53-06.2-11 evidences clear intent by the legislative assembly that only a set percentage be taken from the betting pools and that at least seventy-five percent of the betting pool be returned to the bettors.

The North Dakota Racing Commission does not have the authority as an administrative agency to modify the takeout percentages set forth in N.D.C.C. § 53-06.2-11. To permit such modification would result in a legislative act by the Commission which would, in effect, be an amendment to that section. This is a matter which is left to legislative action.

I do not find N.D.C.C. § 53-06.2-10.1 to be inconsistent with this opinion. That section authorizes off-track parimutuel wagering to be "conducted in accordance with this chapter and interim standards that need not comply with chapter 28-32, or rules adopted by the commission under this chapter." N.D.C.C. § 53-06.2-10.1 specifically requires that off-track parimutuel wagering be conducted in accordance with N.D.C.C. ch. 53-06.2. As a result, such wagering must be conducted in accordance with the provisions of N.D.C.C. § 53-06.2-11.

As I have indicated earlier, legislative action will be necessary to modify the takeout percentages set forth in N.D.C.C. § 53-06.2-11. The legislative assembly may, in its discretion, set forth differing percentages or may establish procedures to be followed by the Commission for setting different percentages.

It is my understanding that North Dakota is not the only state which has been confronted with problems of differing takeout percentages when attempting to pool with race tracks of other jurisdictions. I have been informed that in many of these cases, legislation is being proposed to modify the percentages or procedures in the pooling of wagers. This appears to be the action which must also be taken in this state.

I trust that I have adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

dfm

cc: Daniel Diemert  
Vincent Lindstrom  
Laura Locket  
Jerry Trenbeath  
Bruce Quick