

## **Opinion No. 65-151**

August 11, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

**TO:** Mrs. Margaret Foster, Administrative Assistant, State Racing Commission, P.O. Box 8576, Station C, Albuquerque, New Mexico

### **QUESTION**

#### QUESTION

Certain ineligible race horses have been nominated and the nomination fees paid for the 1965 and 1966 New Mexico Thoroughbred and Quarter Horse Futurities. The races are to be run at the New Mexico State Fair and the fees were paid to that agency. Can these fees be legally refunded to the nominator who inadvertently nominated the horses in question since the New Mexico State Fair is a state agency.

#### CONCLUSION

Yes.

### **OPINION**

#### {\*257} ANALYSIS

Article IV, Section 30 of the Constitution of New Mexico provides as follows:

"Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied."

Numerous Attorney General Opinions and several New Mexico Supreme Court decisions have considered the quoted section. It is our opinion that under the facts presented here a refund by the New Mexico State Fair will not violate Article IV, Section 30, supra. Rule No. 259 of the State Racing Commission Rules of Racing provides that all nomination and additional fees for a race such as we are considering here shall be deposited in a Trust Account in an approved New Mexico bank and that all accrued interest thereon shall be added to the purse. Thus, the money under consideration has never reached the treasury of the State of New Mexico. The constitutional provision quoted above is directed toward the State's money in its treasury and its purpose is to insure legislative control and to exclude executive control over the purse strings of the

state. **Gamble v. Velarde**, 36 N.M. 262, 13 P. 2d 559 (1932). The money here being considered is not subject to legislative control. We have found no other law which would prevent the refund under consideration. The New Mexico State Fair has received this money not as fees paid to a state agency but as fees to a licensee of the State Racing Commission and as a licensee, the Fair will be bound by a determination of the Commission that the money should be refunded.

Whether or not the money should be refunded is, in our opinion, a determination to be made in the sound discretion of the State Racing Commission. We note that the agreement under which the nomination fees were made contains no provision that will control in this matter. Also, we find no rule in the Commission's rules of racing that will dispose of the question. Because this is the first time this question has arisen, we recommend that the Commission not only decide this particular case but exercise its rule-making authority and require that the agreements under which futurities and sweepstakes are conducted include all conditions regarding fees paid.