

Opinion No. [30-66]

November 8, 1930

TO: Office of the Attorney General of New Mexico

PUBLIC MONIES -- Treasurer may pay from suspense fund under statute.

OPINION

I am in receipt of your request for an opinion as to whether or not the recent decision of the Supreme Court in the case McAdoo Petroleum Corporation vs. Commissioner of Public Lands, No. 3452, wherein it was held that the Commissioner of Public Lands could make no refunds without the legislature having made specific appropriations therefor, applies in the case of suspense funds such as the suspense fund of the Supreme Court.

Our statute with reference to suspense funds, and which governs in the case of the particular suspense fund that you have in mind, is section 112-122, Codification of 1929. This statute provides that all unearned monies deposited in a suspense account with the State Treasurer by any state officer or state agency shall, **"as soon as the same shall become the absolute property of the State of New Mexico,"** be transferred out of said suspense account to the proper fund, and the said law goes on to provide that:

"Whenever it shall be finally determined that any moneys so deposited in a suspense account should be returned, repaid or refunded to the person, firm or corporation from whom the same were received, such moneys shall be paid out of the suspense account of the state treasurer upon a warrant drawn by the state auditor based upon a voucher from the proper state official or agency, as the case may be."

Article IV of Section 30 of the State Constitution on which the court's decision in the McAdoo Petroleum Corporation Case, above referred to, was based provides that except interest or other payments on the public debt money shall be paid out of the Treasury only on appropriations made by the legislature. It would therefore seem at first glance, that when these suspense funds have once been deposited with the State Treasurer they were in the Treasury to stay until such time as the legislature appropriated them for some purpose. Furthermore it is manifest of course that the said section 112-122, Codification of 1929, is in no sense an appropriation of these monies.

On the other hand the real purpose of a "suspense fund" is simply to have a place where funds coming into the state, through its various agencies can be placed or held in abeyance, so to speak, until such time as it has been definitely determined whether the same belongs to the state, or whether it shall be returned, repaid or refunded to the person, firm or corporation from whom the same was received. Of course, after the said determination of this question, and after the said money, or so much of it as belongs to

the state shall be transferred out of the said suspense account to the proper fund, then, the said Section 30 of said Article of the Constitution would apply and the said money could not be taken out of the Treasury except upon appropriation by the legislature. But, to hold that such portion of the money as did not belong to the state could not be taken out of the Treasury except upon appropriation of the legislature is manifestly absurd for the reason that the legislature could not very well appropriate money which did not belong to the State.

The mere fact that these suspense funds are turned over to the State Treasurer, and are in effect "deposited" with him does not alter the situation, because in such a case these monies really do not go into the State Treasury, and become a part of the public monies of the State until such time as it has been determined by the proper authorities, as stated above, that they are "the absolute property of the State of New Mexico" as provided in the section 112-122 Codification of 1929.

The facts in the McAdoo Petroleum Corporation case were such as to distinguish it from the question of suspense funds because, in that case the monies which came into the office of the Commissioner of Public Lands had been transferred directly into the proper funds without being held in suspense at all. Hence, in effect they had become "the absolute property of the State of New Mexico" and section 30 of Article IV of the Constitution applies.

In view of the foregoing I conclude that the decision of our Supreme Court in the McAdoo Petroleum Corporation case was not meant to apply in the case of suspense funds and hence it is my opinion that you would be justified in paying refunds drawn against such funds.