STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#92028

STATE OF NEBRASKA
OFFICIAL
FEB 21 1992
DEPT. OF JUSTICE

DATE: February 21, 1992

SUBJECT: Formula for Determining Payments by Racetracks to the Track Distribution Fund

REQUESTED BY: Senator Howard Lamb
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

In light of the Nebraska Supreme Court's recent decision in Nebraska State Board of Agriculture v. Nebraska State Racing Commission, 239 Neb. 762, ___ N.W.2d ___ (1992) ["NSBA"], you have asked us to again address the question of whether handle generated from wagering at racetracks conducting licensed horserace meetings via simulcasting should be included as part of the "total parimutuel handle" of a racetrack for purposes of determining the rate of the racetrack's contribution to the Track Distribution Fund ["Fund"] under Neb.Rev.Stat. §2-1208.04(1) (Reissue 1987), or whether only handle generated by a racetrack at live race meetings should be included in determining the percentage contribution of a racetrack to the Fund. By letter dated June 4, 1991, we advised the Nebraska State Racing Commission ["Commission"] that, in our opinion, the reference in §2-1208.04(1) to "any racetrack that had for its previous race meet a total parimutuel handle" should be interpreted to include only handle generated on-track at the previous live race meeting conducted by the racetrack. In our letter to the Commission, we noted and discussed the pending appeal before the Nebraska Supreme Court in NSBA.

Subsequent to the issuance of our informal opinion to the Commission, you requested our opinion on this issue by letter dated

L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Laura H. Essay
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

August 1, 1991. We answered your letter by correspondence dated September 24, 1991. At that time, we advised you that we had closely examined the question a second time, and "acknowledge[d] that arguments [could] be presented on both sides of this issue. . . ." Noting the pending appeal in NSBA, we declined to retract our earlier informal opinion, and indicated your request brought "to light the need for legislative clarification of this issue in the next unicameral session." As the court has now rendered its opinion in NSBA, you have again requested that we revisit this issue. We assume your request is based on your desire to introduce amendatory legislation in the event we decline to alter our previous opinion.

The issue in NSBA was whether the reference in Neb.Rev.Stat. §2-1208.03(5) (Reissue 1987) to the "total annual parimutuel handle" of a racetrack, "based on the previous racing year," should be construed to include both simulcast and live race meet handle at a racetrack for the purpose of determining whether a racetrack qualified as a "recipient track" eligible for distribution from the Fund. The Racing Commission contended that wagers on simulcast races are part of the total annual parimutuel handle of the track where the wagers are accepted. NSBA, 239 Neb. at 764. The Nebraska Supreme Court agreed, stating "Under §2-1208.03(5), all wagers placed at the track are aggregately considered for the purpose of the statute, whether such wagers are placed on races occurring at the site where the wagers are placed or are placed on races simulcast to the site where wagers are placed." Id. at 769.

The court's analysis of the statute included an interpretation of the word "annual" as included in the phrase "total annual parimutuel handle." It could be argued that the language of §2-1208.03(5), referring to the total "annual" parimutuel handle of a racetrack, based on the "previous racing year," is broader in scope than the language employed in §2-1208.04(1), which refers only to the "total parimutuel handle" that a racetrack had for "its previous race meet." Under this view, the court's conclusion that both simulcast and live race handle at a racetrack are to be aggregated for purposes of determining a racetrack's eligibility as a recipient track under §2-1208.03(5) was arguably based on the significance of the use of the references to total annual handle based on the previous racing year, which the court concluded evinced a legislative intent to include all handle at a racetrack generated during a calendar year.

In our opinion, however, a court, if faced squarely with the present question, would not distinguish the two statutes on this basis. To do so would, in effect, allow the contributing tracks to "have it both ways" at the expense of the recipient tracks. As the

court pointed out in NSBA, the Track Distribution Fund was established "for the purpose of subsidizing smaller Nebraska racetracks at the expense of the state's larger and more successful tracks." Id. at 764. Although the question is a close one, and clarifying legislation would still be desirable, it is our opinion a court would likely hold that total parimutuel handle includes all wagers placed at a track whether such wagers are placed on races occurring at the site or are placed on races simulcast to the site. This conclusion is supported, albeit in dicta, by the court's discussion in NSBA. The court stated, "This case involves interaction of two legislative programs . . . The first of these programs is the Track Distribution Fund, by which revenue, based on a racetrack's total annual parimutuel handle, is distributed from larger racetracks to smaller racetracks. See §§2-1208.03 and 2-1208.04." Id. at 763-764. In describing the Track Distribution Fund, the court treats both statutes as one "legislative program." The court makes no distinction between the two statutes even though §2-1208.03 defines "recipient track" as "a racetrack with a total annual parimutuel handle, . . ." and §2-1208.04 describes a contributing track as "any racetrack that had for its previous race meet a total parimutuel handle. . . ." (emphasis added).

Consequently, in light of the Nebraska Supreme Court's decision in NSBA, we believe section 2-1208.04 requires racetracks to make contributions to the Track Distribution Fund based on "total parimutuel handle" including wagers on simulcast races accepted at the track.

Respectfully submitted,

DON STENBERG
Attorney General

Steve Grasz
Steve Grasz
Deputy Attorney General

APPROVED BY:

Attorney General

3-563-3