

## Opinion No. 51-5378

July 2, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Mr. Robert McKinney Chairman New Mexico Economic Development Commission  
Santa Fe, New Mexico

{\*60} This is in response to your letter of June 25, in which you requested an opinion as to whether the Tourist Bureau is a "legally constituted agency of the State of New Mexico," and, if so, what its legal function is. You also ask whether you can properly transfer the files and records of the Economic Development Commission to the Tourist Bureau.

In determining the legality of the Tourist Bureau, four main questions must be considered: (1) Was {\*61} the Tourist Bureau created by the Legislature? (2) If not, can the Tourist Bureau be considered a "de facto" office or bureau? (3) Whether legal or illegal, have the Bureau's existence and operations been those of an independent agency, or has the Bureau functioned as a division of the Highway Department? and (4) If the latter, has its operation under the Highway Department been legal? That is, does the Highway Department have the power to perform the functions which have been performed by one of its divisions, the Tourist Bureau? I will consider each of these propositions separately in the same numerical order as above.

1. A diligent search of the New Mexico Statutes from 1912 to date, and a review of New Mexico decisions reveal no mention of the Tourist Bureau. I am confident that no such reference to the Bureau exists. It is not, then, a creation of the Legislature.

2. Some have suggested informally that whether the Tourist Bureau was specifically provided for by the Legislature or not, the fact of its sixteen years existence now gives it a degree of immunity from attack as to its legality, even if it be considered an independent agency. There is no support at law for such a contention, that is, a suggestion that the Bureau may have a "de facto" existence. The law is settled on the point that there can be no such thing as a de facto office. That is, an office which is not created or authorized, directly or indirectly, by the Constitution or legislative enactment has no legal existence. See 43 Am. Jur. 475, and 11 Words and Phrases, 501-508. In my opinion, although the term "office" as a rule refers to power conferred upon an individual, by analogy the same rule should apply to a bureau. The legal existence of the Tourist Bureau, therefore, must rest upon different grounds.

3. There is no evidence that the Tourist Bureau exists and operates except as a division of the Highway Department. All Tourist Bureau funds come from the Highway Department. All its accounts are audited by the Highway Department Auditor in the same manner as are those of all other Highway divisions. The same voucher forms and same payroll forms are used by all Highway Department divisions, including the Tourist

Bureau. Tourist Bureau personnel are hired and fired by the Highway Department. In my opinion, it seems incontestable that in the administrative plan of the Highway Department, the Tourist Bureau operates and is regarded as a division of the Department, and nothing more.

4. I have stated above that the Tourist Bureau was not specifically created by the Legislature, that in my opinion it can have no independent or de facto existence, and that further in my opinion, its existence and operations have been as a division of the Highway Department. The legality of the Bureau's existence, therefore, depends upon whether its duties and functions are those which the Highway Department is authorized to perform. There is one portion of the New Mexico Statutes which can be construed as giving the Highway Department such power.

The last sentence of § 58-213, N.M.S.A., says: "The (Highway) Commission may issue and circulate such bulletins, pamphlets and literature as it may deem necessary." The fact is that the present § 58-213 has remained unchanged since its original enactment in 1912. See Laws of 1912, Chap. 54, Sec. 4. The section in its entirety reads:

"The commission shall conduct such investigations and experiments as in its judgment may tend to the benefit of highway construction in the state, and make reports thereof to the governor, and may cooperate with state or national organizations in experiments and work {\*62} for the advancement of highway construction. It shall cause investigations and tests of road materials to be made within the various counties of the state until a sufficient knowledge is obtained of the location and availability of all materials suitable for road building, and in such investigations and tests may call upon and utilize any of the officers, employees, equipment or resources of any of the state educational institutions. Provided, however, that the actual cost of such tests or investigations made by any institution shall be borne by the state and paid from the state road fund. The commission may issue and circulate such bulletins, pamphlets and literature as it may deem necessary."

The strictest interpretation of this section might lead to the conclusion that since the sentence under consideration is found in this paragraph, the Commission can issue only such literature as pertains to "investigations," "experiments," "materials suitable for road building," etc. In my opinion this section is not to be so narrowly construed. It is, of course, difficult to determine what the actual intent of the 1912 Legislature was in the enactment of this sentence giving the Commission power to issue "literature." But the mere fact that the sentence we are concerned with is found in a particular paragraph does not limit the power given to that extent. Note that the sentence does read, in part, "such bulletins, pamphlets, and literature **as it may deem necessary**," and not "such literature pertaining to 'road materials'." In 50 Am. Jur. 385, it is said: "A Statute subject to interpretation is presumed not to have been intended to produce absurd consequences, but to have the most reasonable operation that its language permits, and it is a general rule that where a statute is ambiguous in terms and fairly susceptible of two interpretations, the unreasonableness or absurdity which may follow one construction or the other may properly be considered." Again, in 50 Am. Jur. 360, we

read: "A statute will not be given a construction by which its effectiveness would be seriously impaired, where a different construction is possible."

It is interesting to note parenthetically at this point that although no one has ever seriously questioned the right of the Highway Department to issue highway maps, such power must stem from the portion of the statute under consideration, if statutory authority be sought.

It is further my opinion, however, that the bulletins, pamphlets, and literature issued by the Commission must pertain to the subject of highways or be calculated to enhance highway construction or improvement in this state. I consider literature attracting tourists to the state to be within the latter category. Also, the size, extent of operation, and budget of the Bureau must, in my opinion, conform to the test of "reasonableness."

Let us examine the operation of the Tourist Bureau in light of these considerations. The Bureau helps prepare and distribute state highway maps and tourist maps. With the approval of the Commission, it contracts for national advertising. It answers the inquiries of prospective tourists who have read this national advertising. It also maintains an information booth in Santa Fe which distributes maps and gives out tourist information. While the Highway Department employs a total of 1,250 personnel, exclusive of contract labor, the Bureau numbers eight, or about .6 of 1% of the total. Unofficial figures show that while the total expenditures of the Highway Department in fiscal year 1951 amounted to over \$ 18,000,000, the Bureau spent \$ 293,000, or about 1.6%. The 1952 budget calls for a total expenditure of \$ 25,000,000 by the Highway Department, of which amount the Bureau is to receive \$ 290,000. It is my opinion that all {\*63} of the Bureau's activities are well within the purview of the last sentence of § 58-213, N.M.S.A., that its size and budget easily meet the test of reasonableness, and that the Tourist Bureau is, therefore, operating legally and is legally constituted as a division of the Highway Department.

In considering the question of "reasonableness," it is interesting to note the views of the Federal Bureau of Public Roads on this point, and its attitudes toward state diversion of funds derived from state motor fuel and license taxes. An important, if not indispensable, part of the program of any state Highway Department is the Federal aid received under the Federal Highway Act. (23 U.S.C.). In fiscal year 1951 such aid to New Mexico amounted to over \$ 3,000,000. A portion of this act, 23 U.S.C. § 55, reads as follows:

"Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use at least the amounts now provided by law for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such

revenues have been pledged, and for no other purposes, under such regulations as the Secretary of Commerce shall promulgate from time to time. Provided, That in no case shall the provisions of this section operate to deprive any State of more than one-third of the amount to which that State would be entitled under any apportionment hereafter made, for the fiscal year for which the apportionment is made."

This section was intended to prevent States seeking Federal highway aid from diverting taxes on gasoline and motor vehicles to uses other than construction, improvement, and maintenance of highways, and retirement of highway bonds. 39 Opns. U.S. Atty. Gen. 157. But as will be seen in the ensuing paragraphs, the Bureau of Public Roads has construed the statute liberally in favor of the states.

In February 1939, Clinton Anderson, as director of the Coronado Cuarto Centennial Commission, advised the Bureau of Public Roads of the forthcoming centennial and the proposal to increase the Tourist Bureau budget from \$ 63,000 to \$ 100,000 for the year 1940 to meet extraordinary expenses. (The actual Tourist Bureau expenditures for 1940 amounted to \$ 133,424.25 as compared with a total Highway Department expenditure of \$ 11,929,230.89). Mr. Anderson asked the Bureau of Public Roads whether such an increase would be regarded as an infringement of the Hayden-Cartwright Act, supra, and would subject the state and Highway Department to penalties provided in the act. He pointed out that the Tourist Bureau had been in operation several years "through and under the Highway Department." The answer to this inquiry was dated February 9, 1939, and was signed by L. E. Boykin, then the Acting Chief of the Bureau of Public Roads and now its Chief Legal Adviser. This letter of reply said in part:

"The question of using highway funds for advertising the highway resources and scenic and other features of States has been before the Bureau for a number of times, very often taking the form of a plan to take a certain sum from the highway fund and set up an independent advertising agency. {\*64} The Bureau's position in all cases has been that any provision for advertising which will involve the use of highway funds should be limited to an authorization for the highway department to use such sum as in its judgment might be deemed necessary for publishing maps and for carrying on an appropriate program of advertising, but that legislation should not set up a separate and independent organization to handle such advertising nor should it appropriate or set aside any particular sum for that purpose. We have never undertaken to suggest how much a State highway department should spend for such purpose, being willing to leave that to the administrative discretion of the highway department. We have taken this position for the reason that it was recognized that it long has been the practice of highway departments to distribute maps and other information concerning the roads of their respective States, points of scenic and historic interest and other resources and attractions. We think that this is an appropriate function of a highway department and have never regarded it as diversion so long as the matter is handled by the highway department as suggested above."

As I have indicated above, in my opinion, the Tourist Bureau is legally constituted under New Mexico law and its size, extent of operation, and budget meet the test of

reasonableness. What the exact dividing line between reasonableness and unreasonableness would be I have not attempted to define, nor will I do so. I have also outlined the views of the Federal government on the subject of tourist advertising. In my opinion, the present operations of the Tourist Bureau in no way jeopardize the Highway Department's receipt of Federal funds under the Federal Highway Act.

In answer to the other part of your request, I submit the following:

The Economic Development Commission is authorized by §§ 3-608 -- 3-615, N.M.S.A., to do such acts as may be necessary and proper in fostering and promoting the industrial development and economic welfare of the State. On the other hand, it is my opinion that such an activity would not be a proper or legal function of the Tourist Bureau, as it would exceed the statutory authority granted the Highway Department. Also, since Tourist Bureau funds are derived from the "road fund" of the Highway Department, I am of the opinion that such a program would be regarded by the Bureau of Public Roads as a "diversion of funds" and would subject the Highway Department and the State to the penalties of the Federal Highway Act. See 23 U.S.C. § 55.

In view of the foregoing, it is my opinion that the Tourist Bureau would not be the proper custodian of the Economic Development Commission files, and that, therefore, you should not, and cannot legally, transfer these files to the Bureau.

I hope that this opinion has proved helpful and has answered your questions on this matter.