

Opinion No. 51-5472

December 31, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Alva A. Simpson, Jr. Director Department of Public Welfare Santa Fe, New Mexico

{*185} This is in reply to your letter of November 28, 1951, concerning the Tharp farm, in which you request an advisory opinion from this office on the legality of three alternative procedures that might be followed by the Department of Public Welfare in order to take advantage of Mr. N. L. Tharp's generous offer to give to the State of New Mexico a farm for an Old Peoples' Home.

I shall deal with each proposal separately. Proposal No. 1 calls for an outright conveyance of the farm to the State of New Mexico. In my opinion this would be the ideal legal proposition for the State to accept. Under the powers and duties of the Welfare Board, enumerated in §§ 73-103 & 73-104, N.M.S.A., 1941, the Board has the necessary power to accept this farm, that is, the part that is in the State of New Mexico, as an outright gift. This would raise no question of Aid to Private Enterprise under Art. 9, Section 14 and Art. 4, Section 31 of the New Mexico Constitution.

You advised that Mr. Tharp desires to retain a certain interest in the farm for a limited period of time. It is my opinion that this interest could be retained with the conveyance to the State being a purchase with deferred payments or a gift with reservations for a period of time. In either case the Department's title and control over the farm would be absolute and not subject to any Board of Trustees or Directors of a non-governmental nature.

The second proposal was that a conveyance be made to a non-profit corporation. It is my opinion that this proposal would be satisfactory if the non-profit corporation were controlled by the State and became a subordinate governmental agency. The ruling of our Supreme Court in the case of Hutchinson v. Atherton, 44 N.M. 144, indicates that this will be necessary so as to avoid a conflict with the provisions of Art. 9, Section 14 of the Constitution. It is my opinion that if the second proposal be adopted the Trustees of the Corporation must be under direct control and supervision of the Department of Public Welfare as a state agency and that the corporation in all instances be subject to complete control of the Department and of the State of New Mexico.

Your third proposal was that Mr. Tharp set up an institution and operate it in conformity with the requirements of the State Department of Public Welfare and of the State Department of Public Health and that the State Department of Public Welfare then agree by contract to purchase accommodations for aged inmates. The Department of Public Welfare has adequate authority under §§ 73-103 & 73-104, N.M.S.A., 1941, to enter into such a contract or agreement for the care of indigent aged persons. Art. 9,

Section 14 of the New Mexico Constitution specifically excepts from the prohibitions against Aid to Private Enterprises the expenditure of funds for the care and maintenance of indigent persons. An agreement such as is proposed here would clearly fall within this exception.

The proposed agreement would not constitute the making of any appropriation for charitable, educational or benevolent purposes as prohibited by Art. 4, Section 31 of the Constitution but would be payments {**186*} for maintenance and care and services for the aged.

The only alternative suggestion which has not been discussed would be that of leasing outright the Tharp farm and the operation of it by the Department. Under such an arrangement the Department would necessarily have complete control and supervision. If considerable improvement of the farm is necessary before it can be used, the Department could advance the cost of such improvements and the value thereof being applied against the rental due to Tharp and his heirs. This would, of course, necessitate a long-term lease in order to justify the making of such improvements.

Trusting that this advisory opinion will be of benefit and assistance to you, I remain