

Opinion No. 56-6377

February 3, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Dallas Rierson, Director of Agriculture, New Mexico College of Agriculture and Mechanic Arts, State College, New Mexico

As requested by you we are treating the letter of January 4, 1956, from Seymour R. Black, an Attorney from New Jersey, as a request for an opinion from this office. There are three questions involved, to-wit:

1. Can the State of New Mexico require a nursery operating in another state which takes orders from New Mexico residents, to secure a certificate of inspection under the provisions of §§ 45-19-1 through 45-19-11, N.M.S.A., 1953 Compilation?

Clearly, we think that a state may, under the police powers, provide for suitable measures to prevent the introduction into the state, of articles of trade, which on account of their existing condition would bring in disease or pestilences. *Bowman vs. Chicago and Railway Company*, 125 U.S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700.

The provisions of §§ 45-19-1 to 45-19-11 are analogous to the animal inspection laws of the various states which have been recognized as a legitimate exercise of the powers of the state to prevent the spread of disease and to protect the people within a state. See 65 A.L.R. 539. The purpose of this Act is to insure that only disease free nursery products are shipped into New Mexico. In order to accomplish this purpose there is a provision for the inspection of out of state nurseries to insure that such nursery is free from diseased plants and shrubs. The fee charged is merely for the purpose of providing means for the enforcement of the Act and is not an unreasonable amount. The purpose of the Act is not to interfere with Interstate Commerce and does not unduly interfere with the free-flow of products into the State of New Mexico, and the means employed to accomplish the purpose of the Act are legitimate. See *Duckworth vs. State of Alabama*, 68 Sup. Ct. 311, 318 U.S. 390.

Therefore, in answer to Question No. 1, we are of the opinion that New Mexico can require out of state nurseries to comply with the provisions of §§ 45-19-1 through 45-19-11, before their products can be shipped into the State of New Mexico.

2. Under the provisions of the above named statute, is an out of state nursery which does not maintain solicitors, dealers or agents within the State of New Mexico required to comply with the provisions of the above numbered statute prior to shipping nursery stock to the State of New Mexico?

The fact that an out of state nursery does not have an agent, dealer or representative selling its products in the State of New Mexico would not exempt such nursery from

securing a certificate of inspection. Section 45-19-4, requires every person, firm or corporation outside the State to secure a certificate " **before offering for sale**, soliciting orders, shipping or storing nursery stock into or within the State of New Mexico." It is only after a certificate has been secured that such nursery is allowed to ship, transport, store or sell such nursery stock within the State of New Mexico through any agent, dealer or other representative. The very purpose of this Act is to cover the whole field of shipping, transporting, storing, or selling out of state nursery products within the State of New Mexico. The ultimate purpose being that only disease free nursery products will come into New Mexico. To limit the requirement of the certificate to out of state nurseries having salesmen and representatives within the State would actually defeat the purpose of the Act and therefore we are of the opinion that such distinction is without merit. The provisions of this Act apply to any out of state nursery who ships, offers for sale, transports or sells nursery stock in the State of New Mexico whether they have a salesman or representative in the State or not.

3. If an out of state nursery fails to comply with the above named statute, can nursery stock which is shipped into New Mexico be confiscated because it does not have the necessary tags showing the certificate of inspection?

The provisions of §§ 45-19-1 through 45-19-11 do not include a provision for the confiscation of nursery stock shipped into the State of New Mexico from an uncertified out of state nursery. We are of the opinion that any person having such uncertified nursery stock in his possession would violate the provisions of this Act and be subject to the penalty provision set forth in § 45-19-10. Also, any attempt to sell such uncertified nursery stock would be a violation of the Act and subject to the same penalty provision.

If upon inspection of such products it was found that the products were diseased and not otherwise up to the standards required by the provisions of this Act, they very likely would be a nuisance which could be abated in a special action for such purposes in a District Court of this State, and by following the provision for an abatement of a nuisance such nursery stock could be confiscated under proper order from the District Court in which such action might be filed.

Trusting we have answered your questions, we remain

By: Paul L. Billhymer

Assistant Attorney General