

Opinion No. 59-35

April 15, 1959

BY: FRANK B. ZINN, Attorney General

TO: Honorable James R. Patton State Representative Dona Ana County P. O. Box 392
Las Cruces, New Mexico

State Bank Examiner had no authority to issue a permit in 1950 for Otero County State Bank to operate an agency in Dona Ana County at White Sands Missile Range, and has no authority under present law to issue a branch banking permit to the bank for operation in Dona Ana County.

The records relating to banks of the State Bank Examiner are not public records generally open for inspection.

OPINION

{*53} This is in reply to your recent request for my opinion on the following two questions:

Did the Otero County State Bank at Alamogordo have legal authority to conduct its banking agency or facility at White Sands Missile Range in Dona Ana County which it has operated since 1950, and does the Otero County State Bank have authority in law now to continue to conduct a branch banking business at White Sands?

Are the records, correspondence and other pertinent reports contained in the Bank Examiner's files and which relate to the agency or branch at the White Sands Missile Range, public records and open for inspection?

It is my opinion that the permit granted by the State Bank Examiner to the Otero County State Bank in 1950 for the operation of an agency or facility at White Sands Proving Ground in Dona Ana County, New Mexico, was not lawfully granted under the laws relating to banking then in force. It is my further opinion that the State Bank Examiner could not, under present law, issue a permit to the Otero County State Bank to conduct a branch bank in Dona Ana County.

The problems at hand arose out of the establishment in May of 1950 of a banking agency at the White Sands Missile Range in Dona Ana County by the Otero County State Bank at Alamogordo, New Mexico. The establishment of this banking agency was encouraged and indeed sanctioned by certain agencies of the federal government. Approval of the establishment of the banking agency was also granted by the office of the State Bank Examiner. In 1950, there were three banks operating in Dona Ana County. At the time of the establishment of the banking agency in question, the applicable New Mexico law, being Section 50-216, N.M.S.A., 1941 Compilation,

prohibited the establishment of branch banks, but this prohibiting statute contained a provision to the following effect:

"Provided, nothing herein contained shall prevent any bank from opening an agency or agencies, for the purpose of accepting deposits, cashing checks and buying and selling exchange, making loans and doing a general banking business, in the same county in which said bank is located, in an adjoining county if there be **no bank in operation in such adjoining county**, or within a radius of one hundred (100) miles from said bank if there be **no bank in operation in the county in which such agency is opened**; and provided further, that a permit to open such agency or agencies shall first be obtained from the state bank examiner." (Emphasis mine)

As can be readily seen, the then applicable law prohibited the establishment of a banking agency in an adjoining county unless there was no bank in operation in that adjoining county; and further, prohibited the establishment of a banking agency within a radius of 100 miles of the bank unless there was no bank in operation in the county in which the agency was to be opened. I must conclude that the action of the State Bank Examiner in the year 1950, in approving the establishment of the Otero County State Bank's banking agency at White Sands in Dona Ana County, was without authority in law. Much has been said in the briefs submitted to me about the non-willingness of the Dona Ana County Banks to establish facilities {**54*} at White Sands. To an extent, this has been disputed; but in any event, is in my opinion, not material. It is not the willingness of banks in the county to establish the facilities which is the criterion, but rather the existence in operation of banks in the county of the proposed branch location.

The statutory provision relating to branch banks now in force is Section 48-2-17, N.M.S.A., 1953 Compilation, which reads as follows:

"Branches or banks authorized under the provisions hereof shall be authorized to accept deposits, cash checks, buy and sell exchange, make loans and do a general banking business, Provided, however, that such branches must be located in the same county in which said bank is located, in an adjoining county if there be no bank in operation in such adjoining county, or within a radius of one hundred [100] miles from said bank if there be no bank in operation in the county in which such branch is opened; and Provided further that a permit to open such branch shall first be obtained from the state bank examiner."

While this provision of the law now authorizes branch banks instead of banking agencies, they are still prohibited if there is a bank operating in the county in which the branch is proposed to be opened. Again, under present law, operation of a bank in the county is the criterion, not willingness to conduct branch banking operations in the area in question.

Section 48-2-19, N.M.S.A., 1953 Compilation, a portion of present law, is urged as saving the situation by validating the action of the State Bank Examiner. It reads:

"Any bank agency or agencies heretofore opened and conducted prior to the passage and approval hereof **under the authorization contained in chapter 50 section 216 of the New Mexico Statutes Annotated, 1941 Compilation**, are hereafter to be conducted and known as branches under the authorization hereof." (Emphasis mine)

In my opinion, this section does not validate the prior action of the State Bank Examiner, in granting the Otero County State Bank, a permit for its agency at White Sands since this section is not operative unless the agency previously established was done so lawfully under the provisions of Section 50-216 of the 1941 Compilation, cited and discussed at the beginning of this opinion.

It has been urged that I place a very liberal construction upon the applicable provisions of the law. To my way of thinking, interpretation of the statutes cited would not be proper. I think the language used is clear and unambiguous and accordingly, construction of statutes has no place in this particular controversy. **Burch v. Foy**, 62 N.M. 219, 308 P. 2d. 199.

I recognize that since the State Bank Examiner first took action in 1950, there has been a nine year administrative construction of law contrary to the result reached by me. In cases of ambiguous statutes, administrative construction is entitled to great weight, but such construction is not binding where the provisions of the law are clear and certain. **Owens v. Swope**, 60 N.M. 71, 287 P. 2d. 605.

With all deference due the action of the State Bank Examiner in 1950 and followed until this date, I cannot agree with an interpretation of the law, as authority for the issuance by the Bank Examiner of a permit to the Otero County State Bank for a branch or agency in Dona Ana County.

It is most fortunate that the Otero County State Bank, having established and operated the White Sands Branch acting as it did under the urging of the United States Treasury Department, and with approval of the State Bank Examiner, and which has continued for several years must now be found to have operated without statutory authority. However, the principles of fair play and moral rectitude cannot be substituted by me for the very plain statement in the law that branch banks cannot be authorized in counties outside the principal bank's domiciliary county when there are banks already operating there. Ours is a government of laws, not of men, and I can only apply the law in rendering this opinion.

In regard to your second question, research has disclosed that generally speaking, the records of the State Bank Examiner, in a matter such as this, are not public records and accordingly, are not open to public inspection.

Section 48-6-3, N.M.S.A., 1953 Compilation, requires an oath by the Bank Examiner and his deputies to keep secret all information acquired by them in the discharge of their duties.

Section 48-6-7, N.M.S.A., 1953 Compilation, provides as follows:

"Neither the state bank examiner, nor his deputies or employees, nor the state corporation commission, nor any member thereof, nor any deputy, clerk or employee in its office shall divulge any information acquired by them in the discharge of their duties, except insofar as the same may be rendered necessary by law. The state bank examiner may exchange information as to the condition of banks with the United States comptroller of the currency and banking departments of other states. Any one who shall violate the provisions of this section shall be deemed guilty of a misdemeanor."

I can see no conflict between these two last cited sections and between Section 48-6-10, N.M.S.A., 1953 Compilation, requiring banks to make and publish a periodic report of condition. I realize that copies of reports and records concerning banks and banking may be received into evidence according to the provisions of Section 48-6-16, N.M.S.A., 1953 Compilation, and that according to Section 48-6-17, N.M.S.A., 1953 Compilation, certain reports made by the State Bank Examiner to the Governor are made public documents. However, generally speaking, the records in the State Bank Examiner's office are not public records and are not open to the public for inspection. I must give a negative response to your second question.

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