

## **Opinion No. 71-105**

September 1, 1971

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. James L. Dillard Director New Mexico State Park and Recreation Commission  
State Capitol Building Santa Fe, New Mexico 87501

### **QUESTIONS**

#### QUESTIONS

1. What state agency or commission has primary authority to determine questions of improvements and construction upon Fort Selden State Park, Dona Ana County, New Mexico?
2. What is the nature of the authority vested in the Cultural Properties Review Committee in regard to improvements or restoration at Fort Selden State Park?
3. What procedure is required by state law in order to expend monies under the 1971 General Appropriations Act by the State Park and Recreation Commission to improve Fort Selden State Park?

#### CONCLUSIONS

1. The New Mexico State Park and Recreation Commission.
2. See analysis.
3. See analysis.

### **OPINION**

#### **{\*157} ANALYSIS**

Numerous state laws have been enacted by various sessions of the legislature relating to the development of Fort Selden, in Dona Ana County, as state property. In addition, a myriad of state laws touch upon the authority of different state agencies or commissions to exercise various planning functions, exert review or advisory functions, and to give or withhold approval over the disbursement of funds for the development of public facilities.

For the reasons discussed below, any determination of which agency has "primary authority" in questions of improvements and construction upon Fort Selden involves consideration of these various state laws as well as federal law.

Title to the land encompassing Fort Selden was originally owned by the federal government. Subsequently, the Fort was abandoned and the buildings and structures fell into disrepair and ruin. Title to the land passed into private hands and remained there for many years.

The legislature by Laws 1963, Chapter 240, created Fort Selden State Park. The legislation specified that "Fort Selden State Park shall be under the supervision and control of the State Park Commission." Pursuant to this legislative provision, the State Park and Recreation Commission began negotiations to acquire the land necessary to purchase and establish the park, and by May, 1970, the State Park and Recreation Commission had entered into a contract to acquire the lands whereon the main portions of the original buildings of the Fort had been situated.

Section 4-9-1, N.M.S.A., 1953 Comp. provides that:

{\*158} "There is created a 'State Park and Recreation Commission' which shall develop, maintain, manage and supervise all state parks and recreation areas within the State of New Mexico. '\* \*'"

Therefore, since Fort Selden was specifically designated by an act of the legislature as a state park, and since under Section 4-9-1 the State Park and Recreation Commission is vested with authority to "develop, maintain, manage and supervise all state parks and recreation areas within the state" it is the opinion of this office that the State Park and Recreation Commission possesses ultimate authority to determine questions as to the development and improvement of Fort Selden.

2. However, in actuality this authority is subject to approval by the Cultural Properties Review Committee. This Committee was created by the Cultural Properties Act of 1969 (Chapter 223, Laws of 1969) "to provide for the preservation, protection and enhancement of structures, sites and objects of historical significance within the state." Another reason for the creation of the Committee was to obtain federal matching funds (under the National Park Service Historic Preservation Grant Program. Under this program no federal matching funds can be obtained) unless approved by a state liaison officer and a review committee appointed by the Governor. (P.L. 89-665, 80 Stat. 915). The State Planning Office acts as liaison officer and the Cultural Properties Review Committee is empowered to identify and determine what sites are historical or cultural properties and to prepare a register of such properties suitable for preservation. Section 4-27-8, N.M.S.A., 1953 Comp.

The Cultural Properties Act also vests the Museum of New Mexico and the State Planning Office with certain powers and functions in respect to preserving historic and cultural properties. Section 4-27-9 of the act provides that "the Museum of New Mexico is responsible for administering, developing and maintaining all registered cultural properties which belong to the state, provided funds are available. Development and maintenance shall be in accordance with the long-range state plans approved by the committee."

The act further spells out in Section 4-27-10 that the State Planning Office shall prepare a long-range plan for the preservation of cultural properties acquired or to be acquired by the state.

The Cultural Properties Review Committee following its creation, undertook in conjunction with the State Planning Office and the Museum of New Mexico to develop a register of historic sites in New Mexico. On March 21, 1969 the Fort Selden site was entered on the register as a historic site by the Committee and on July 8, 1970, the federal government similarly entered Fort Selden as a historic site on the national register.

The determination of Fort Selden as a state historic site and also as a historic site on the national register had the effect of qualifying the state-owned property for federal matching funds for the development and preservation of such property.

The legislature by Laws 1969, Chapter 127, Section 1, enacted a comprehensive severance tax bonding act, designed to provide funds for the acquisition of state park and recreational sites. This law (Sec. 72-18-37.13, N.M.S.A., 1953 Comp.) provided in part:

"The state board of finance may issue and sell severance tax bonds in compliance with the Severance Tax Bonding Act (72-18-29 to 72-18-51) in an amount not exceeding the aggregate sum of two million one hundred twenty-one thousand dollars (\$ 2,121,000) **when the state park and recreation commission certifies the need exists for issuance of the bonds for the purpose of improving existing parks and facilities and for the acquisition and construction of new parks and facilities. . .**" (Emphasis supplied)

Subsequently, the legislature by Laws 1970, Chapter 35, authorized the issuance and sale of severance tax bonds for financing cultural properties preservation. This law provides:

{\*159} "When instructed by the cultural properties review commission that it is necessary for these purposes, and upon approval by the state board of finance of detailed plans and specifications, the state board of finance may issue and sell severance tax bonds in compliance with the Severance Tax Bonding Act in amounts not exceeding these maximums.

\* \* \*

D. Fort Selden, Dona  
Ana County:  
Land purchase \$ 2,000  
Excavation and  
stabilization 75,500  
Restoration 25,000

Visitor center 24,500  
Layout, trails, markers 10,000"

And, in Chapter 327, Section 3 of Laws of 1971 a further measure relating to the expenditure of funds for the development of Fort Selden was enacted:

"In anticipation of reimbursement of federal funds to carry out the provisions of Chapter 35, Laws of 1970, the director of the department of finance and administration may authorize the loan of funds from the operating reserve fund to the property control division. The loan should not exceed the federal share of project costs and shall be repaid upon reimbursement by the federal government."

This provision then, coupled with federal requirements, results in the Cultural Properties Review Committee having authority to veto any plan recommendation for Fort Selden presented by the State Park and Recreation Commission.

First, the Committee alone has responsibility for presenting a plan to the Secretary of Interior. Second, this plan having been approved and a grant made pursuant to the approval, any material deviation from the plan would result in revocation of the grant. Third, the state funds are dependent on the federal matching funds. See Chapter 327, Section 3, **supra**.

Thus it appears that although the Park and Recreation Commission has primary authority to determine questions of improvements and construction at Fort Selden, in actuality, because the Cultural Properties Review Committee controls the purse strings, the Park and Recreation Commission must present a plan, in this instance, which will meet with the approval of the Cultural Properties Review Committee.

However, any money derived from other appropriations or funds available to the State Park and Recreation Commission may be expended by the Commission for the development of Fort Selden State Park in the discretion of such Commission, so long as there is compliance with the provisions of Section 11-2-65, N.M.S.A., 1953 Comp.

It is our opinion, then, that where federal money (or other appropriations dependent on such money) is not involved, the legislature intended that the State Park and Recreation Commission exercise primary control over the development and operation of Fort Selden State Park, with the Cultural Properties Review Committee and the State Planning Office offering advisory and consulting assistance. Further, the State Park and Recreation Commission, subject to the authority of the Department of Finance and Administration and the State Board of Finance, has the ultimate right of determination as to what source of state funds to utilize in the development of the park -- subject, of course, to the availability of funds.

However, where funds to be utilized are part of a National Park Service Grant or state funds tied to such a grant, the plan is subject to approval by the Cultural Properties

Review Committee. Only after such presentation and approval can the Department of Finance and Administration release the funds.

3. The procedure required by state law for the expenditure of money appropriated {*\*160*} by the 1971 Legislature for the development of Fort Selden is as follows:

(a) The State Parks and Recreation Commission must present a plan to the Cultural Properties Review Committee for approval. This plan must conform with that proposed by the Committee in "Historic Preservation -- A Plan for New Mexico."

(b) After agreement is reached between the two, the Cultural Properties Review Committee must then notify the State Board of Finance that in its opinion "it is necessary" to preserve such area as a cultural property;

(c) The State Board of Finance in its discretion may then direct the issuance and sale of severance tax bonds pursuant to Section 1, Chapter 35, Laws of 1970;

(d) The money then must be matched with federal funds made available for the development of Fort Selden; or in anticipation of federal matching funds, the director of the Department of Finance and Administration may authorize the loan of funds from the operating reserve fund to the property control division for use in implementing the plans for developing such areas.

Obviously such a procedure involves the cooperation and approval of a number of different state agencies in order to develop Fort Selden State Park. Therefore, even though the State Parks and Recreation Commission has primary authority, without its cooperation with these various agencies -- particularly the Cultural Properties Review Committee -- there will be inadequate development of Fort Selden State Park. We urge a meaningful dialogue between the various agencies involved with a view in mind of reaching an amicable settlement. The converse would be damaging to the overall program of preserving our state parks.

By: Leila Andrews

Assistant Attorney General