

Opinion No. 71-61

April 28, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Terence W. Ross Chairman, Joint Executive Committee Colorado and New Mexico Railroad Authorities 111 Barcelona Lane Santa Fe, N.M. 87501

QUESTIONS

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1. Following House Bill 300, the 1971 General Appropriations Act, may any of the \$ 50,000 appropriated for the purpose of finding a concessionaire to operate the Cumbres and Toltec Scenic Railroad and to adequately protect the state's investment be expended if Colorado and New Mexico fail to enter into a compact agreement?
2. May the New Mexico Railroad Authority, pursuant to House Bill 300, direct the fiscal agent to deposit into a joint account of the New Mexico and Colorado Railroad Authority funds constituting the New Mexico Railroad Authorities estimated monthly expenses?
3. Does House Bill 300, the 1971 General Appropriations Act, permit the New Mexico Railroad Authority to expend funds for repair and rehabilitation of property owned by the Authority?
4. Are appropriations made to the New Mexico Railroad Authority by the 1971 session of the legislature subject to the limiting provisions of Section 11-4-1.7, NMSA, 1953 Comp. which prohibits the expenditure of more than one-half of an agency's appropriation or approved budget, whichever is less, in the first six month period of each odd numbered fiscal year?

CONCLUSIONS

1. Yes.
2. Yes, see analysis.
3. Yes.
4. No.

OPINION

{*87} **ANALYSIS**

1. House Bill 300, the 1971 General Appropriations Act, as it pertains to the Cumbres and Toltec Scenic Railroad operation states as follows:

"Park and Recreation: \$ 50,000 (from the general fund).

To be used in the 59th and 60th Fiscal Year for the Railroad Authority for necessary expenses required to seek a concessionaire to operate the Cumbres and Toltec Scenic Railroad and to adequately protect the state's investment. From the effective date of the Cumbres and Toltec Scenic Railroad Compact, all expenditures shall be in accordance with the compact. None of the appropriations shall be expended unless matched by an equal appropriation by the State of Colorado. For purposes of fiscal administration, the Park and Recreation Commission {*88} shall serve as agent for the New Mexico Authority."

In the first sentence the Railroad Authority is given the power to expend the \$ 50,000 for the purposes of seeking a concessionaire to operate the railroad and also to adequately protect the state's investment. The second sentence alters this power only in case a compact is formed. From the date of the compact expenditures are then to be made in accordance with the compact. It is our opinion that until a compact is formed, expenditures may be made for the legislatively directed purposes stated in the section and as authorized by the Railroad Authority.

2. The applicable part of this section for purposes of your second question is the last sentence which states: "for purposes of fiscal administration, the Park and Recreation Commission shall serve as agent for the New Mexico Authority." It is our opinion that this language directs the Park and Recreation Commission to be the agent for the Railroad Authority for purposes of fiscal administration, and the Railroad Authority cannot relieve the Park and Recreation Commissioner of this duty. However, the Park and Recreation Commission is the **agent** for the New Mexico Railroad Authority, and must make expenditures at the direction of the Railroad Authority. Consequently, it would be permissible for the Railroad Authority to direct the fiscal agent to deposit into the joint account of the New Mexico and Colorado Railroad Authorities a sum equal to the approximate amount of New Mexico's half of one month's expense. Proper accountings, however, must always be made to the fiscal agent. It is our opinion that such an operation in no way relieves the Park and Recreation Commission from its duty to act as fiscal agent for the Railroad Authority. Since expenditures are made only to cover estimated monthly expenses, and full accounting is made to the fiscal agent, basic responsibilities involved have not been shifted.

3. House Bill 300 permits the Authority to expend money "to seek a concessionaire to operate the Cumbres and Toltec Scenic Railroad and to adequately protect the state's investment." The sub issue arises, then, whether or not protection of the state's investment includes repair and rehabilitation of Authority property.

The Authority recently purchased the Cumbres and Toltec Scenic Railroad with funds appropriated by the legislature for this purpose. See Chapter 44, N.M. Laws 1970. The

purpose of such investment was to "promote the public welfare by encouraging and facilitating the use of the recreational facilities in the remote areas of the state inaccessible by other routes and by preserving, as a living museum for future generations, a mode of travel which helped in the development and promotion of the territory and state." See Section 69-11-3, NMSA, 1953 Comp.

It is our opinion that repair and rehabilitation of property owned by the Authority is not only permitted under House Bill 300, but is essential to the protection of the state's investment in such property. With no rehabilitation, some property could not ever be used, and with no maintenance other property would deteriorate beyond use. Such a situation would seriously jeopardize the state's investment -- a result never intended by the legislature.

4. Section 11-4-1.7, NMSA, 1953 Comp. provides in pertinent part:

"State budget division -- periodic allotments. -- . . . The expenditures of any state agency as defined in section 11-4-1.1 New Mexico Statutes Annotated, 1953 Compilation, for the first six [6] months period of each odd-numbered fiscal year shall be limited to one-half [1/2] of the appropriation or approved budget, whichever is less, for that fiscal year. This restriction shall not apply to those agencies whose operations are more efficiently measured by periods other than a fiscal year, . . .

As we see, this statute expressly provides that the limitation shall not apply to "agencies whose operations are more efficiently measured by periods other than a fiscal year . . ."

The New Mexico Railroad Authority was created by the Railroad Authority {89} Act, Sections 69-11-1 to 69-11-12, NMSA, 1953 Comp. (1969 P.S.). The purpose of the Act and of the Authority is to provide a method for acquisition, operation, and preservation of historic and scenic railroads. Scenic and historic railroads are by their nature seasonal operations. The general inclimate conditions of the winter months, especially in the northern mountains of New Mexico, render it virtually impossible to operate, maintain, or rehabilitate the railroad system during this period. As the whole railroad operation becomes dormant, so also do many of the fiscal responsibilities of the Railroad Authority.

Consequently it is our opinion that this operation would be more efficiently measured by some period other than a fiscal year, and that the limiting provision of Section 11-4-1.7, **supra** does not apply to the 1971 appropriation to the New Mexico Railroad Authority.

Furthermore, it should be noted that the appropriation made by the State to the Railroad Authority for the 59th and 60th Fiscal Years was an **emergency and deficiency** appropriation. These appropriations differ from general appropriations in that they are meant to meet immediate expenses. It is also our opinion the deficiency appropriations are not subject to the provisions of Section 11-4-1.7, **supra**, as this is clearly not the intent of the legislature in making this type appropriation.

By: Oliver E. Payne

Deputy Attorney General