

## **Opinion No. 58-13**

January 20, 1958

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,  
Assistant Attorney General

**TO:** Dr. F. L. Schneider, Secretary-Chief Veterinarian, Sheep Sanitary Board of New Mexico, Room 334 Korber Building, Albuquerque, New Mexico

### **QUESTION**

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"1. Heretofore we have contributed 5% of our annual budget towards the support of the State government in Santa Fe as required by law. In each instance our fiscal year expenditures have been less than the total amount set up in our annual budget. Should not we be charged 5% on that sum in the budget actually expended rather than on the total sum set up in the budget?"

"2. The New Mexico Sheep Sanitary Board, under provisions of State Statutes and upon decree of the Board, charges 5 cents per head on sheep being brought into the State of New Mexico. Under the law, may this fee be charged Indians on sheep coming into New Mexico, with final destination to points on Indian Grants or to points within Indian Reservations in this State?"

"3. Frequently biologics or special drugs in limited quantities are supplied owners of sheep on an experimental or demonstrational basis, these owners under certain circumstances are expected to pay actual cost to the Board of the items so furnished. Should we under such circumstances collect the usual 2% State School Tax on such transactions?"

"4. Inquiries are received from producers or manufacturers of biologics located outside of New Mexico intended for distribution through persons holding biologic licenses in this State, with the express purpose of being used on livestock in New Mexico, desiring to become informed as to whether or not distributors and/or producers licenses in New Mexico under our animal biologic law become applicable. Should such out of state distributors and producers be required to be in possession of New Mexico biologic licenses before they may legally distribute biologics to holders of biologic licenses in New Mexico for use on sheep? If so, and in case of the failure of such out of state distributors to take out annual New Mexico biologic distributor licenses what legal action, if any, may be taken by us to enforce compliance?"

#### **CONCLUSIONS**

1. No.

2. No.

3. No.

4. Yes; See analysis.

## OPINION

### ANALYSIS

The general administrative overhead for your Board is provided for by Chapter 235, § 6 C, Laws of 1957 (§ 11-4-4, page 105 Pocket Parts, N.M.S.A., 1953), as follows:

**"There shall be included in each budget of departments, commissions, board, and agencies, exclusive of the state highway department, department of game and fish and the state land office, an item for 'general administrative overhead' expense equal to five percent of the total budget;** Provided that any department which makes or has made other arrangements for paying administrative overhead costs shall be excepted from this provision, if approved by the department of finance and administration. Provided further that the budgets for general administrative overhead expense shall be paid each year into the state General Fund." (Emphasis supplied.)

Considering the language underlined, it is our opinion that the budgetary line item considered is exclusive. No suggestion is made that proposed budgets shall be submitted on a basis of actual past overhead expenditures nor that the five percent be determined by any manner other than is specifically provided. Payment of the "general administrative overhead" in accordance with the manner related would be impractical by reason of the fact that no actual expenditure would be determinable until after the running of the fiscal year for which the considered appropriation is made.

Your second question involves the fundamental question of a state's authority over Indian lands and reservations. On this subject it has been said:

"The jurisdiction of the Federal Government over Indian tribes and over the members of such tribes while they are on Indian reservations is exclusive. Consequently, such Indians, while they are on their reservations, cannot be controlled or governed by the laws of the state within which the reservations are located. Thus, it has been held that the Constitution of a state or an act of its legislature cannot prevent the application of an act of Congress to the Indian tribes, which, although residing within the state, are subject to the control of the Federal Government. Although an Indian becomes a full-fledged citizen of the United States, yet if he continues to live on a reservation, he is subject to the exclusive jurisdiction of the United States. If the tribal relation is still recognized by the United States as existing, the fact that the primitive habits of the Indians have been modified by their intercourse with the whites does not authorize a state to treat them as subject to its laws." 27 Am. Jur. 572.

Specifically, federal authority for jurisdiction over commerce with the several Indian Tribes is founded in the Commerce Clause (Art. 1, § 8, paragraph 3) of the Constitution. It is by this same authority that the Federal Government sustains control over commerce between the states.

The state act giving rise to the question above put is found as § 47-8-12, N.M.S.A., 1953, and provides as follows:

"Any person intending to bring any sheep into the state from any other country or state shall give notice in writing of his intention to do so to the secretary by telegraph, registered letter, or delivery in person, or by telephone to the secretary or other authorized official of the board so that the notice is received at least forty-eight (48) hours previous to the proposed day of entry. The notice shall state the number of head, the date and place the sheep will be loaded, and destination of same. The secretary shall then issue a permit for entry of the sheep into the state, stating in the permit and applicable board regulations to be complied with before or after entry into the state. The shipment shall be accompanied by a health certificate issued by a federal or authorized state inspector that the sheep are healthy and free from scabies or other contagious or infectious disease. On arrival, the inspector shall examine the sheep as to their sanitary condition and inspect and make a record of all the marks and brands on the sheep, which record shall be forwarded to the board office and used for future reference. He shall then issue the shipper a health certificate if he is satisfied that the sheep are free from scabies or other contagious or infectious disease and a copy of the brand inspection certificate. A fee to be fixed by the board in a sum not to exceed five cents (5c) per head shall be charged and paid to the inspector by the owner or person in charge of said sheep for the inspection and certificates. If the inspector should find that the sheep are infected with scabies or other contagious or infectious disease he shall require the owner or the person in charge of them to comply with the quarantine, dipping, and treating provisions of Section 11 (47-8-11). Provided, however, that the provisions of this section shall not apply to sheep loaded on railway cars which are being transported from some country or state to another country or state through the state of New Mexico, if the sheep are not to be unloaded in this state, except in railroad yards or other quarantine pens for the purpose of feeding and watering the same for a period of time not to exceed twenty-four (24) hours."

From the language of the proviso afore quoted, it becomes apparent that the Legislature did not intend to invade the area of Federal control exercised over commerce between the several states. Accordingly, since Federal control of commerce with the Indian Tribes is similarly founded, it is our opinion that no fee may be charged for the importation or inspection of sheep passing through the state but destined for an Indian Reservation.

The third point of inquiry stated may be answered by reference to Subsections 72-16-2 (a) and (g), which respectively provide:

"When used in this act:

(a) The term 'person' or the term 'company' herein used interchangeably, includes any individual, estate, trust receiver, business trust, corporation, firm, copartnership, joint adventure, association, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is clearly disclosed by the context.

(g) The term 'engaging' when used in this act with reference to engaging or continuing in a business or a profession shall also include the exercise of corporate or franchise power, but the term 'engaging' shall not be construed in this act to include occasional and isolated sales, or transactions by a person who does not hold himself out as engaged in business."

The emergency school tax (Sales Tax) is a privilege tax, the incident of which falls upon the licensed privilege of conducting or carrying on a business or profession. See Attorney General Opinion No. 57-247. The license is granted to a non-sovereign entity by the state and the tax realized from the activity so licensed ensures to the benefit of the state. The law does not contemplate the state taxing itself. Accordingly, it is our opinion that the Board is not required nor is it authorized to collect State "School Tax" as suggested.

Your final question requires construction of the following language found in § 47-19-1:

"Any person, firm or corporation, except a duly licensed and registered druggist, desiring to sell, produce, distribute or manufacture any serum, vaccine or other biologics intended for diagnostic or therapeutic use with animals in the state of New Mexico, shall first obtain a license from the cattle sanitary board of New Mexico."

Considering first the disjunctive classifications stated, it becomes apparent that any person, firm or corporation which falls within any of the categories provided must be licensed accordingly.

Additional assistance is found in construing the section by turning to the title of the original act wherein is found the following:

"AN ACT RELATING TO THE USE, PRODUCTION, SALE, DISTRIBUTION AND MANUFACTURE OF BIOLOGICS TO BE USED WITH ANIMALS: PROVIDING THE **OBTAINING OF LICENSES THEREFOR**: AND PROVIDING FOR PENALTIES FOR VIOLATIONS THEREOF."

Here we also find contemplation for licensing each of the classifications specified. Accordingly, it is our opinion that out-of-state distributors and producers are required to be in possession of New Mexico licenses if doing business in this State.

Finally, enforcement of the "Biologics" act herein considered is contemplated in Section 47-19-5:

"Any person, firm or corporation failing to comply with the provisions of this act shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than fifty dollars (\$ 50.00) nor more than three hundred dollars (\$ 300.00) or by imprisonment in the county jail not less than thirty days (30) nor more than one hundred eighty days (180), or by both such fine and imprisonment."

Accordingly, a complaint may be filed in any justice court having jurisdiction based on venue and upon a finding of guilt, a penalty, in keeping with the aforesaid may be imposed.