

## **Opinion No. 64-41**

March 25, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

**TO:** Mr. W. J. Keller, President of Board of Regents, Museum of New Mexico, Santa Fe, New Mexico

### **QUESTION**

#### **FACTS**

The Historical Society of New Mexico, a non-profit private corporation, has with few exceptions, received annual appropriations of territorial or state funds since 1884. The private corporation prior to New Mexico's statehood received federal permission to occupy space in the Palace of the Governors and this right of use has continued permissively from 1885 down to the present. Since its inception, the Historical Society has collected and preserved historical materials and has exhibited and stored such items in the Palace of the Governors in Santa Fe. Considerable of the historical items collected by the corporation were acquired by means of purchase with New Mexico territorial or state funds. Gradually, since the 1920's, the work and expense of exhibiting and maintaining the Historical Society's collections have been assumed and borne by the state and museum personnel employed by the Museum of New Mexico. Acquisitions of historic materials have been made by purchases, donations and loans. In 1942, by general agreement, property registration, and virtually the complete care of the Historical Society's collections were taken over by the Museum of New Mexico. Since such time the collections of the Historical Society have been largely amalgamated and commingled with materials owned by the Museum of New Mexico, and the care, cataloguing and custodianship of these valuable historical items has almost entirely devolved upon the state of New Mexico. Since 1961 no officers of the corporation have had any professional connection with the Museum of New Mexico, and the present records pertaining to the historical materials acquired by the Historical Society and the Museum of New Mexico and located in the area of the Palace of Governors used by the corporation are largely non-existent or incomplete. In a majority of instances existing records do not clearly indicate or reflect the fact of public or private ownership, source of origin or method of acquisition of such historical items as are now located in such area of the museum.

#### **QUESTIONS**

1. Who now owns the collections of historical objects, books and manuscripts acquired by the Historical Society of New Mexico and which are now located in the Museum of New Mexico?

2. May the state legally appropriate public funds for the use and benefit of the Historical Society of New Mexico, a private corporation?

3. What legal status does such private corporation enjoy in respect to the occupancy of quarters of the state Palace of Governors?

## CONCLUSIONS

1. See analysis.

2. No.

3. Tenant or licensee by permission.

## OPINION

### ANALYSIS

As stated in the facts you have enumerated above, the Historical Society of New Mexico is a private non-profit corporation and for a period of approximately eight decades has been the recipient of territorial or state public fund appropriations. The first direct appropriations to the society were made by the territorial legislature in 1884 (Chapter 78, Laws of 1884), and such law restricted the use of the money appropriated to "the purchase of rare and curious objects of historical . . . etc . . . value," and further stated that **"all articles so purchased shall be registered as being purchased with the money of the Territory,** and shall never be disposed of by said society in any way, and in case said society shall at any time be dissolved or become extinct, such articles shall become the property of the Territory or State of New Mexico."

From time to time since 1884, the territorial and state legislatures have made appropriations to the Historical Society of New Mexico, for use by the corporation for salaries, maintenance expenses, and for acquisition of historical materials. The legislative appropriations through the years for the Historical Society have either been made directly to the corporation or to the Museum of New Mexico for the benefit of the Historical Society. This practice has been followed to the present time and the 1963 general appropriation act (Chapter 287, Section 7, Laws 1963) in its appropriation to the Museum of New Mexico included a line item appropriation of \$ 10,000.00 to the Historical Society of New Mexico.

As shown by the facts above, the historical society as a private corporate entity has through the years acquired a considerable number of valuable and historical items by means of either (1) purchase, (2) donation, or (3) loan.

Your first question requests our opinion as to the ownership of such property as is now in the possession of the Museum of New Mexico and which was acquired by the society

previously. We think that the actual mode of acquisition of such property provides in part the key to this dilemma.

First, as to those items acquired by the Historical Society by means of direct purchase utilizing public funds appropriated by the territorial or state legislatures, it is our opinion that such items are legally and equitably in fact the property of the state of New Mexico and that the corporation acquired such property and holds the same as trustee for the people of the state of New Mexico. Certainly the action of the legislatures in providing public funds to the private corporation was premised upon an intent to permanently preserve for the citizens of this state such articles of historical value as might be acquired. Legal recognition is frequently given by the courts to the principle that a court of equity will declare the existence of a trust created by operation of law, whenever the circumstances are such that the public interest dictates that a particular party is truly and equitably entitled to the property. **Flanagan v. Benvie**, 58 N.M. 525, 273 P.2d. 381; **Boardman v. Kendrick**, 59 N.M. 167, 280 P.2d. 1053; and **Velasquez v. Mascarenas**, 71 N.M. 133, 376 P.2d. 311.

Second, such property as may have been donated or bequeathed to the Museum of New Mexico or the Historical Society of New Mexico by private donors or testators, would according to the specific intention of the donor or testator of such property vest either in the Museum of New Mexico or the Historical Society of New Mexico. As held in **Espinosa v. Petritis**, 70 N.M. 327, 373 P.2d. 820, the elements of a gift are: property subject to a gift, competent donor, donative intent, delivery and acceptance. See also **Lusk v. Daugherty**, 61 N.M. 196, 297 P.2d. 333; **Ross v. Berry**, 17 N.M. 48, 124 P.2d. 342. The donor's intent and the recipient's actual acceptance largely control the passing of title to the property by means of a gift or bequest, and wherever possible must be ascertained in order to determine whether a gift or bequest transpired and the actual recipient. Where property has been left by testamentary disposition the terms of the will would in most instances indicate and govern as to the particular parties to whom title of the property was intended to be transferred.

Third, where property has been placed on loan with the corporation or the state, the title remains in the person making the loan and his intention at the time of the making of the loan is controlling as to the parties who may hold the property during the tenure of the loan, and such intention governs the terms and provisions of the loan.

Fourth, where there has been a commingling and confusion of property and no records have been maintained by the corporation to indicate the manner of acquisition of particular property or which indicate whether the museum of New Mexico or the corporation are rightfully entitled to the property, such items are in our opinion entitled to be held and maintained by the State of New Mexico.

The general rule in respect to determining the ownership of property which is confused or commingled with the property of another is to require the party who has negligently or willfully permitted his property to become intermingled with the goods of another, to clearly prove those items of property which are rightfully his, otherwise the goods

remain the property of the other party. **Gonzales v. Ilfeld**, 25 N.M. 608, 185 P. 1110; and **Page v. Jones**, 26 N.M. 195, 194 P. 883. From our study of the facts as above stated, it would appear that in instances where objects are confused as to ownership, the burden would be upon the corporation to prove clear entitlement to rightful possession since the property was commingled and placed there upon such premises amidst historic items owned by the state. Similarly, the burden we feel is upon the corporation to indicate which items were acquired by public funds made available by the territory and state of New Mexico, and which items were not. The original territorial appropriation in 1884 required the corporation to register all articles purchased with public moneys. In the absence of a clear showing of non-acquisition of items with public funds or private ownership, such items we believe are entitled to be held for the benefit of the citizens of the state by the Museum of New Mexico.

Your second question inquires whether the state may properly appropriate public moneys to the use and benefit of the Historical Society of New Mexico, a private corporation.

Numerous state constitutional provisions expressly prohibit the expenditure or appropriation of state funds for the use of a private corporation or entity.

Article IV, Section 31, provides in part that "no appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state."

Article IX, Section 14, sets out in applicable part that "neither the state, nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation . . ."

Article VIII, Section 4, also specifies that "any public officer making any profit out of public moneys or using the same for any purpose not authorized by law, shall be deemed guilty of a felony . . ."

In **Harrington v. Atteberry**, 21 N.M. 50, 153 P. 1041 the New Mexico Supreme Court struck down as illegal a legislative statute authorizing county commissioners to appropriate moneys to private fair associations. The court held such statute violated Article IV, Section 31 of the state constitution. Similarly, in **State ex rel. Mechem v. Hannah**, 63 N.M. 110, 314 P.2d. 714, it was held that the state could not constitutionally give or make appropriations for private entities or persons.

Under the above authorities we believe that any appropriation to a private corporation whether directly or indirectly made, would clearly be violative of the state constitutional provisions quoted herein.

The third question propounded requests a determination as to the legal right of the New Mexico Historical Society to enjoy and occupy quarters in the Palace of Governors in Santa Fe.

As stated in the facts above, the New Mexico Historical Society obtained in 1885, permission from the federal government to use a portion of the premises known as the Palace of the Governors in Santa Fe. When the Palace was turned over to the state by the United States government the occupancy of such space was continued permissively and without charge to the corporation. Such use has continued by the corporation to the present time.

Article IV, Section 26, of the New Mexico state constitution expressly prohibits the granting of special privileges to any corporation or private entity and which privilege or favor is not equally extended to all such groups. This section states:

"The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."

As shown by the facts you have set out above, the private corporation has occupied public quarters for over eight decades, and since 1961 has not provided any personnel to maintain or care for such property at such location. We believe that since statehood the occupancy of such public premises has been in the nature of a tenant or permissive licensee and such occupancy of the realty is revocable at the discretion of the board of directors of the Museum of New Mexico. Under the above cited constitutional provision, no special right could be properly invested in a private corporation by law to entitle it to enjoy permanent occupancy of a public building under the control of the state.