Opinion No. 72-02

January 11, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Leila Andrews, Assistant Attorney General

TO: Mr. David W. King, State Planning Officer, State Planning Office, State Capitol, Santa Fe, N.M. 87501, Miss Maralyn S. Budke, Director, Legislative Finance Committee State Capitol, Santa Fe, N.M. 87501

QUESTIONS

BACKGROUND

In a letter issued on January 3, 1966, Deputy Attorney General Oliver E. Payne stated that the State Planning Office has the "authority to enter into agreements on behalf of political subdivisions and public agencies, and to require from such entities the necessary financial and other assurances."

QUESTIONS

1. Does the above statement give the State Planning Office the necessary authority to levy a surcharge on outdoor recreation projects?

2. Does the State Planning Office have the legal authority to request such a surcharge?

3. Does the State Planning Office have legal authority to spend funds generated from such a surcharge?

4. If the conclusions to the above questions are negative, what consequences and alternatives are immediately available for the continuation of this program in New Mexico?

CONCLUSIONS

1. No.

2. No.

3. No.

4. See analysis.

OPINION

*{*4}* ANALYSIS

Since 1966, the State Division of Outdoor Recreation has requested an administrative surcharge from local units of government receiving fifty percent matching funds from the Land and Water Conservation Fund Act of 1965. Apparently, all agencies involved in utilization of the surcharge have done so relying on a statement made by Deputy Attorney General Oliver E. Payne on January 3, 1966. In replying to a Planning Office query as to the legality of that office "entering into agreements on behalf of political subdivisions and public agencies, and to require from such entities the necessary financial and other assurances, Mr. Payne stated that the Planning Office has "Authority to enter into agreements on behalf of political subdivisions and public agencies, and to require from such entities the necessary financial and other assurances." Further, the letter pointed out that the Planning Office can utilize the Joint Powers Agreement Act to implement the above authority.

This broad statement of authority was deemed sufficient to allow the Bureau of Outdoor Recreation to impose the surcharge primarily because of accounting procedures utilized at the time. All concerned labeled the fund from which the surcharge was assessed as "federal" money. Therefore, the practice was approved by the State Department of Finance and the Legislature.

Pursuant to a request made by the Legislative Finance Committee, the State Auditor's office issued a special study of the Planning Office's Bureau of Outdoor Recreation Planning Division funding arrangement on November 29, 1971. This study concludes that funds from which the surcharge is assessed are state severance tax bond proceeds and funds from local units of government. This conclusion results from a theory in which funds granted to a governmental unit lose their original identity once a transfer is complete. For example, the grant of federal money to a "local government" results in a situation in which the money is labeled "local government" money at the date of this transfer. Such a system of labeling is reasonable as long as the system is consistently relied upon and in every instance money granted from one governmental unit to another changes identity upon transfer.

Under this accounting procedure wherein the surcharge is assessed from participating governmental units, the language in Mr. Payne's letter of January 3, 1966, does not give the State Planning Office sufficient authority to levy a surcharge on outdoor recreation projects.

Furthermore, we can find no legislation authorizing assessment of such a surcharge by the Planning Office. Therefore, without authority to assess such funds it can only be concluded that the Planning Office has no authority to spend funds generated by the surcharge.

The change in accounting procedure has resulted in a situation in which the outdoor recreation program in New Mexico previously administered by the surcharge is jeopardized. To remedy the situation we recommend that legislation be introduced in

the up-coming legislative session authorizing the State Planning Office assessment of the surcharge.

If such legislation cannot be implemented it is our opinion that the request be made for an appropriation sufficient to equal the amounts previously obtained through the surcharge method.