**Opinion No. 53-5788**

July 27, 1953

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Honorable R. H. Grissom Treasurer, State of New Mexico Santa Fe, New Mexico

*{*191}* You have requested the opinion of this office as to the legality of investing funds received under § 10 of the Enabling Act in Federal Housing Administration insured mortgages and in Farmers' Home Administration *{*192}* insured mortages.

Your authority to make such investments is contained in § 1 of Ch. 120, Laws of 1953, which reads as follows:

"The state treasurer is hereby authorized, with the approval of those officers and boards whose approval is required by law, to invest any part of the permanent school fund, or of any other fund derived from lands granted to the state of New Mexico, by any act of Congress, in any bonds, notes or debentures of the United States of America, or in any bonds or obligations the payment of the principal and interest of which is unconditionally guaranteed by the United States of America. In making any such investment, the state treasurer is authorized to purchase any bonds, notes obligations or debentures at their current market value, and any premium paid on any such purchase shall be refunded from the interest subsequently accruing on such bonds, notes, obligations or debentures during such period of time not exceeding three (3) years, as the state treasurer may determine."

To come within the act these insured mortgages must be unconditionally guaranteed as to principal and interest by the United States of America. Insofar as Farmers Home Administration mortgages are concerned the obligation is payable directly to the purchaser, who in this case would be the State of New Mexico. If the mortgagor fails to pay the full amount of any installment on or before the due date thereof the Secretary of Agriculture must promptly pay the unpaid amount of principal and interest to the mortgagee, and if the mortgagor becomes in default for more than 12 months, upon request of the mortgagee, the Secretary of Agriculture is required to pay to the mortgagee the full value of the mortgage in cash, including interest and all other charges which may have been paid by the mortgagee in discharging of liens.

It has been held by the Office of the Solicitor of the United States Department of Agriculture, in Memorandum Opinion No. 117, dated April 15, 1952, that the insurance endorsement on such mortgages constitutes a binding obligation of the United States of America and is supported by the full faith and credit of the United States. Similar rulings have been made by the Attorney General of Wisconsin (See Opinion dated June 30, 1951) and by the Attorney General of Colorado (See Opinion dated March 9, 1949). This office concurs in the conclusion reached in each of these opinions to the effect that

such mortgages are unconditionally guaranteed as to principal and interest by the United States of America.

With respect to Federal Housing Administration mortgages, the original mortgagee is an approved federal mortgagee who initially advances the necessary funds to the mortgagor and in turn sells the note and mortgage to the State of New Mexico. Payments on the mortgage are made to the federally approved mortgagee who in turn remits the proceeds to the State of New Mexico, retaining up to one-half of one per cent of the total amount due as his servicing fee. Under § 204 of the National Housing Act, as amended, upon default of the mortgagor and foreclosure by the mortgagee the Federal Housing Administration will pay to the mortgagee the difference between the amount received at foreclosure and the value of the mortgage. Payment is not made in cash *{*193}* but is made in debentures bearing interest at a rate to be set by the commissioner, which is, as we understand it now set at 2 3/4 per cent per annum. These debentures are payable 20 years from their date, which date is the day foreclosure proceedings were instituted. The costs of foreclosure must be assumed by the mortgagee and are partially reimbursed by the United States of America. The debentures above mentioned are payable from any funds in the Treasury of the United States not otherwise appropriated.

It is our opinion that under § 204 of the National Housing Act, as amended, federal housing authority mortgages are fully guaranteed as to principal and interest by the United States of America and therefore are included within the securities authorized by Ch. 120, Laws of 1953.

In contrast to Farmers' Home Administration loans it should be pointed out that the state may suffer a loss if it becomes necessary to foreclose these mortgages, inasmuch as all foreclosure costs will not be paid by the United States of America. Inasmuch as the Legislature saw fit, however, to require only that the principal and interest upon such obligations be guaranteed by the United States of America this factor alone does not render them ineligible under the 1953 Act.

The question of whether or not Ch. 120, Laws of 1953, is in violation of Art. 12, § 7 or Art. 9, § 14 of the Constitution of the State of New Mexico and § 10 of the Enabling Act has been the subject of considerable study by this office. Sec. 7 of Art. 12 reads as follows:

"The principal of the permanent school fund shall be invested in the bonds of the state or Territory of New Mexico, or in any county, city, town, board of education or school district therein. The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must be first approved by the governor, attorney-general and secretary of state. All losses from such funds, however occurring, shall be reimbursed by the state."

Section 10 of the Enabling Act requires the investment of permanent funds "in safe interest bearing securities."

Art. 9 § 14, prohibits the state from directly or indirectly lending or pledging its credit to or in aid of any person, association, or public or private corporation.

Although the question of whether Art. 9, § 14, is to be read together with Art. 12, § 7, to prohibit investment of Enabling Act moneys in the obligations of private individuals or corporations, has not been the subject of a specific ruling by our Supreme Court it was inferentially held in **State v. Marron, 18 N.M. 426, 137 P. 845, 50 LRA NS 274,** that the provisions of Art. 9, § 14 did not prohibit the investment of these funds in obligations of private entities. There the question was whether or not these funds could be invested in the form of bank deposits. It was held that the deposit of these funds in banks constituted an investment of the same. We can see no difference between depositing the funds in banks, which in effect is a loan of the money to the bank, and the purchase of Farmers' Home Administration mortgages, which constitutes a loan to an individual. If a loan to a bank is permissible then a loan to an individual would likewise *{*194}* be permissible, inasmuch as the prohibition of Art. 9, § 14, extends in the same manner to corporations as to individuals.

The Court, in the **Marron** case, raised the question of whether the words "other interest-bearing securities", as contained in § 7 of Art. 12 of the Constitution, are to be construed **ejusdem generis** with the type of securities specifically mentioned in that section of the Constitution, i.e., **bonds** of the state or enumerated political subdivisions thereof. The Court, after stating the arguments both for and against this proposition, declined to answer the question because its decision was not necessary to a disposition of that particular case. The Court did point out, however, that it might well be that this section should be limited to a type of security for the payment of which "the taxing power is available." The classes of securities about which you inquire are secondary obligations of the federal government, acting in the capacity of a surety, and the taxing power of the United States is available for their payment. They are not, however, the same type of obligation as that specifically mentioned in the Constitution. Since, in the **Marron** case, the Court pointed out that the possible construction which it raised might not be followed, and since it is the duty of this office to uphold the constitutionality of any act of the Legislature, unless the same be clearly violative of our basic law, we, as did the Court in the **Marron** case, merely raise the question, but are of the opinion that, until the courts of this state rule otherwise, Ch. 120, Laws of 1953, as it relates to the investments which you mention, should be considered constitutional, and that these investments should be considered legal within the terms of the Enabling Act and the Constitution of the State of New Mexico.

A further question arises as to your authority to pay the one-half of one per cent service charge, which is absolutely essential if you are to purchase Federal Housing Administration mortgages. Neither the General Appropriations Bill (Ch. 167, Laws of 1953) nor Ch. 120, Laws of 1953, make any appropriation for this purpose. Art. 4, § 30, insofar as material, provides as follows:

"Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the Legislature."

While the one-half of one per cent service charge is retained by the servicing agent and never actually comes into the treasury of the State of New Mexico it would be to circumvent this section and to permit by indirection what cannot be done directly to say that this type of arrangement is not in violation of that section unless there be provision elsewhere which would authorize it.

By Art. 21, § 9 of the Constitution of the State of New Mexico the state consented to all provisions of the Enabling Act and by virtue thereof the Constitution of the State of New Mexico is subject to the provisions of that act in the same manner that it is subject to the provisions of the Constitution of the United States of America. Proceedings authorized by the Enabling Act cannot be prohibited by legislation or by the Constitution, absent the specific consent of Congress. We must therefore look to the Enabling Act to see whether there is anything therein contained which would permit the payment of this service charge.

The first paragraph of § 10 of the Enabling Act states that the lands theretofore granted to the state and *{*195}* as granted by the Enabling Act

"are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, * * * and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

Although the courts have not had occasion to consider the powers of the trustee of the proceeds, to-wit, the State Treasurer, the rights, duties, powers and obligations of the Commissioner of Public Lands, who is the trustee of the lands themselves, have been the subject of considerable litigation, and as a result thereof certain basic rules have been pronounced.

It is our opinion that the State Treasurer stands in the same position with respect to the proceeds of trust lands as does the Commissioner of Public Lands with respect to the lands. **Kelly v. Allen, 49 Fed. (2d) 876, cert. den. 284 U.S. 642, 76 L. Ed. 546, 52 Sup. Ct. 23. Application of Dashburg, 45 N.M. 184, 113 P. (2d) 569. United States v. Swope, 16 Fed. (2d) 215. Ervien v. United States, 251 U.S. 41, 64 L. Ed. 128, 40 Sup. Ct. 75. State v. Marron, 18 N.M. 426, 137 P. 845. Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573.** Since, then, the two stand in identical positions the decisions relating to the Land Commissioner are equally applicable to the State Treasurer insofar as the administration of Enabling Act funds is concerned. In **United States v. Swope,** supra, it was said:

"The rule of construction of such trusts is that the absence of a provision for the payment of the reasonable and proper costs and expenses of administering the trust does not throw such expense upon the shoulders of the trustees, but the trustees have an inherent equitable right to be reimbursed for such expenses incurred."

"The trust was imposed upon New Mexico by the act of Congress, but the same rule of construction applies to both public and private grants."

Apparently anticipating such a question as this the Court continued:

"It is obvious that large expenditures must be made in the examination, protection, control, sale, and leasing of this land, **and in the control of the proceeds of the land and of the several funds in which it must be kept.** It must be presumed that Congress was aware of the heavy burden of expense that would be required in the management of these grants, and that it also had knowledge of the settled rule for the construction of such statutes, that where no provision is made in the granting of the trust estate, relating to the expense of administering the trust, the necessary expenses of executing the trust may be paid out of the trust estate." (Emphasis ours).

The portion of the above quotation set in bold face could relate only to the expenses of the State Treasurer and other state officials in controlling the investment and distribution of this money. To the same effect is the case of **State ex rel Greenbaum v. Rhodes, 4 Nev. 312,** cited with approval in the **Swope** case, wherein it is stated:

"In other cases, where the state stands in the place of an ordinary trustee, there could be but little doubt that she would have the right to make the trust land bear the expense of conversion *{*196}* into stocks or other interest-bearing funds, unless there is something in our Constitution requiring the Legislature to pay the expenses of this conversion out of other funds."

It is our opinion that the **Swope** case is definite authority for payment by the State Treasurer out of the proceeds of the trust the necessary and reasonable costs of the investment of the same, and that Art. 4, § 30 of the Constitution of New Mexico cannot be construed so as to prohibit such action. To so construe it would violate the state's consent to the provisions of the Enabling Act.

So that there will be no misunderstanding, nothing in this opinion should be construed so as to require you to invest the Enabling Act funds in either or both of these proposed investments. You may invest these funds at your discretion, subject only to the approval of the State Board of Finance and the State Investment Board. ( **State v. Marron, supra)**.

In passing, we wish to mention that § 2 of Ch. 120, Laws of 1953, setting forth the factors to be considered by you in making investment of Enabling Act funds, is only an empty expression of legislative desire. As above mentioned, the investment of these funds is at your discretion. You may or may not, as you desire, consider the factors mentioned in § 2.

Your attention is called to § 3 of Ch. 120, Laws of 1953, which authorizes you, with the approval of the State Finance Board, to make all necessary rules and regulations to carry out the provisions of the act. Insofar as Federal Housing Administration loans are

concerned it may become necessary for you to enter into contrasts for servicing, with the organizations from which you purchase the securities. Such servicing agencies are in effect the agents of the state and you must look to them for any losses in these funds occasioned by their negligence.

In the event you desire and are subsequently authorized to do so by the proper authorities, it is suggested that you have the representatives of the organizations from whom you wish to purchase these obligations meet with this office so that we may prepare proper contracts and suitable rules and regulations for your adoption with the concurrence of the Board of Finance.

By: W. R. Kegel

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