

Opinion No. 53-5792

August 3, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable Robert D. Castner State Auditor State of New Mexico Santa Fe, New Mexico

{*200} In your letter dated July 15, 1953, you enclose a copy of a letter from a member of the Legislature in which another member joins inquiring into the legality of the use of the water reservoirs for irrigation purposes income fund for administrative expense of the State Engineer's Office. You refer to Ch. 156, Section 1, Laws of 1953, and set out the appropriation to the State Engineer for his salary and other salaries and expenses of his department which are appropriated from the water reservoir fund, together with any additional amounts from this fund as may become necessary, subject to approval by the State Board of Finance. The Interstate Streams Commission is by law authorized to prepare a budget and, upon approval of the same by the Governor, to expend the money through the State Engineer's Office in carrying out the purposes of the trust for which the lands were granted to the state.

Lands for establishing permanent reservoirs for irrigation purposes were granted to the State by the Ferguson Act (30 Stat. 484) in 1898 and the grant confirmed in the Enabling Act in 1910. The Ferguson Act provided that moneys received on account of sales shall be placed to the credit of the separate funds created for the respective purposes named in the Act and shall be used only as a legislative assembly of said territory may direct, and only for the purposes for which the respective grants of land were made.

{*201} The use of the reservoirs for irrigation purposes fund for administrative expenses of the State Engineer's Office and the Interstate Streams Commission has not been passed upon directly by the New Mexico Supreme Court. However, in appropriating the money and budgeting and spending this trust fund the Legislature and the State Engineer and the Interstate Streams Commission are charged with the duty, as trustees, of spending the money for the purposes for which the grant was made, and in that respect their duties as trustees are similar to the duties of the Commissioner of Public Lands in administering the trust lands and the State Treasurer in safekeeping and investment of the proceeds from state lands in safe interest bearing securities. In the case entitled **United States v. Swope, 16 Fed. 2d 215**, the question of the right of the Land Commissioner to pay necessary and proper administrative expenses in connection with the administration of the trust lands was involved and the Federal Court held that he had full authority, as trustee, to make such expenditures as were reasonable and necessary for such purpose. By analogy, the State Engineer and the Interstate Streams Commission could also spend money necessary and proper for administrative expenses which are appropriated by the Legislature and for which a budget is approved for that purpose.

The use of the reservoirs for irrigation purposes fund has been the subject of three Supreme Court cases in past years, two of which went off on a technicality without passing upon the merits in the final decision. **In Asplund v. Hannett, 31 N.M. 641, 249 P. 1074**, the Court held that a taxpayer was not a proper party plaintiff to question expenditure of moneys out of this fund and therefore on rehearing withdrew its original opinion holding that the proposed expenditure was invalid and denied any relief to the taxpayer.

In **State ex rel Yeo v. Ulibarri, 34 N.M. 184, 279 P. 509**, several laws appropriating money from this fund were involved, some of which were clearly for the purposes for which the grant was made and some were doubtful. The Court, in speaking of the doubtful appropriations, used this language:

"So we hold that the omission to limit the appropriation in express terms to a strictly lawful purpose is not necessarily fatal to their validity. We assume that the money will be lawfully expended, and recognize no duty or right to interfere until the contrary is made to appear."

In discussing the fundamental question involved in the case concerning the use of the trust fund in explorations for natural, underground reservoirs, storing or capable of storing for irrigation, to determine their location, boundaries, capacity, sources of supply and replacement, and the best means of conservancy for water therein, the Court gave the purpose for which the funds were granted a very broad and liberal construction and in effect came to the conclusion that any use of the fund to promote irrigation and conserve water in the state was within the purpose. The following language used by the Court shows the broad interpretation given to the purpose for which the fund may be used:

"In New Mexico water is of paramount importance as a means of agricultural development. Our water resources are not limited to surface streams. If they were, thousands of acres of rich lands would be condemned to unproductiveness. We have numerous areas, known or *{*202}* believed to be underlaid with important underground reservoirs. This natural endowment, whether surface or underground, is inefficient without artificial measures for conservancy and application. A study of legislation since statehood, and of the report and recommendations of the several state engineers, discloses the broad policy of using the congressional endowment to promote irrigation by general and widespread investigation of the possibilities of storing water artificially, and of utilizing waters stored naturally. Such a policy tends to equalization of benefits, and to uniformity of development. Congress, the donor, did not assume to dictate a policy. It left that to the trustee in order that it might have the elasticity necessary to meet changes of conditions and advances in scientific knowledge. The limitation imposed is fundamental and broad. A narrow interpretation of a broad restriction, if proper, would be difficult. There appears no reason to qualify the word 'reservoir' by the adjective 'artificial,' nor to narrow the word 'establish' to 'erect.' That is where strict construction finally arrives. So long as the legislative and administrative policy is within

the fundamental purpose and the reasonable meaning of the limitation, it is not for the courts to interfere."

It is apparent, therefore, that the many duties imposed upon the State Engineer and Interstate Streams Commission are all related to the water economy of the state and it is impossible to determine, without more facts, what proportion, if any, of the administrative expense should be charged to any one fund. For that reason it is the opinion of this office that the appropriation from this fund made by the Legislature is presumed to be valid and the approved budget under such appropriation is sufficient authority for the State Engineer and Interstate Streams Commission to spend the money in accordance with the appropriation and budget, and you, as State Auditor, can legally issue state warrants upon the presentation of properly executed vouchers from money budgeted for use of the State Engineer and the Interstate Streams Commission.

By: C. C. McCulloh

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