

## **Opinion No. 57-314**

December 5, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker,  
Assistant Attorney General

**TO:** Honorable Murray E. Morgan, Commissioner of Public Lands State Land Office,  
Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

May the State Treasurer take such action as may be necessary to credit to the permanent fund of the common schools, funds previously credited to the permanent fund of Eastern New Mexico Normal University, in accordance with direction of the State Land Office, through inadvertent error?

#### CONCLUSION

Yes.

### **OPINION**

#### ANALYSIS

As we understand it, the State Land Office has heretofore directed that certain moneys, representing royalties with respect to certain oil and gas wells, be credited to the permanent fund of Eastern New Mexico Normal University, and the State Treasurer has so credited such moneys, since January 1, 1957. It now appears that such moneys should properly have been credited to the permanent fund of the common schools, by reason of the location of the oil and gas wells involved, and your inquiry relates to the propriety of action by the State Treasurer to correct this inadvertence.

The Enabling Act for New Mexico (36 Stats. at Large 557, Ch. 310), after granting certain lands to the State for purposes specified in Sections 6 and 7 thereof, expressly provides the following conditions to which such grants are subject, in Section 10, providing in relevant part as follows:

"It is hereby declared that all lands hereby granted . . . are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, 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.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act shall be deemed a breach of trust; . . ."

These provisions were expressly consented to by the State of New Mexico in the Constitution of New Mexico, Art. XXI, Sec. 9, and continue to govern in the absence of modification agreed to by the United States and the people of New Mexico (Const., Art. XXI, Sec. 10).

It is clear that lands granted to the State of New Mexico by the United States are held by the state in trust for the purposes of the grant, and no other purposes. No proposition of law is better settled than this, that the diversion of land grant trust moneys to any other purpose, however salutary, is unconstitutional. See *State v. Ervien*, 251 U.S. 41 (1919); *Lake Arthur Drainage District v. Field*, 27 N.M. 183 (1921); *State ex rel Shepard v. Mechem*, 56 N.M. 762 (1952); and *State ex rel State Highway Commission v. Walker*, 61 N.M. 374 (1956).

The authorities cited require the conclusion that the inadvertent diversion of land grant trust funds presented by the facts outlined in this inquiry, must be corrected.

Is there any legal impediment to the correction of this situation? We find none. Indeed, the Supreme Court, in dealing with the problem presented by the diversion of certain land grant trust funds to the general fund to defray general governmental expenses, in *State v. Mechem*, supra, expressly stated, at 56 N.M. 771:

"The balance was increased by the amounts diverted from the trust fund, and it will be an easy matter for the treasurer to credit such amounts back to the various trust funds from which they were wrongfully taken.

\* \* \*

"In view of the funds available in the general fund the money can be restored to the trust funds by book entries, **and this the treasurer must do.**" (Emphasis added)

The law not only authorizes, but requires, prompt rectification of the situation.

In accordance with the law governing accountability for trust funds, it is apparent that the permanent fund of the common schools should be credited with the amount heretofore inadvertently credited to the permanent fund of Eastern New Mexico Normal University, and the related income fund should be credited with the earnings of any part of such amount which may heretofore have been invested. (See 90 C.J.S., Trusts, Sec. 384, p. 692). To this end, the State Land Office should furnish to the State Treasurer an itemized statement of the amounts inadvertently directed to be credited to the Eastern

New Mexico Normal University permanent fund, showing the date and amount in each case.

We are advised that the Eastern New Mexico Normal University permanent fund does not now have on hand uninvested cash in an amount sufficient to restore in full the amount inadvertently directed to be diverted from the permanent fund of the common schools. In our view, the latter fund should be made whole as promptly as cash may be made available, either directly, or through liquidation of investments, provided such liquidation can be accomplished without loss to either trust fund concerned.