

## Opinion No. 59-46

May 5, 1959

**BY:** FRANK B. ZINN, Attorney General

**TO:** Mr. S. E. Reynolds State Engineer P. O. Box 1079 Santa Fe, New Mexico  
Mr. A. E. Hunt Director Department of Finance and Administration Santa Fe, New Mexico

Appropriation of trust funds, created by grant from the United States, in aid of a person, association or public or private corporation does not violate Art. IX, Sec. 14, of the Constitution of New Mexico.

### OPINION

{\*69} This is written in reply to your recent request for an opinion on the following question:

Does the constitutional provision against pledging the credit of the State or making any donation to or in aid of any person, association or public or private corporation prohibit the legislature from appropriating funds for such purposes arising from trusts created by the federal government in aid of irrigation purposes?

It is my opinion that an appropriation by the state legislature from funds arising from lands set aside by the federal government and held by the State in trust for irrigation purposes, which appropriation is in aid of a private irrigation district or community ditch, does not violate the constitutional provision prohibiting the pledging of credit or the making of a donation to or in aid of any person, association or public or private corporation.

The Twenty-fourth Legislature by House Bill 112 made an appropriation of \$ 100,000.00 for the purpose of "constructing, improving and repairing" certain "dams, reservoirs, ditches, flumes and appurtenances" located in Guadalupe and San Miguel Counties and owned by community ditch corporations. The appropriations are to come from the New Mexico Irrigation Works Construction Fund, a fund created by the 1955 legislature and codified as Section 75-34-23 (P.S.) of New Mexico Statutes Annotated, 1953 Compilation. Section 75-34-23, supra, provides that the Irrigation Works Construction Fund shall consist of "income creditable to the permanent reservoirs for irrigation purposes income fund not otherwise pledged under Section 75-34-19, New Mexico Statutes Annotated, 1953 Compilation . . . and all other moneys which may be appropriated by the state legislature to said construction fund." I am advised that the legislature has appropriated no money in support of the fund created by Section 75-34-23.

The permanent reservoirs for irrigation purposes income fund is the fund created by Sections 7-1-16 and 7-1-17 of New Mexico Statutes Annotated, 1953 Compilation, and

arises from the moneys collected through the sale, lease or other income from the lands set aside by the federal government for certain purposes through the Act of June 21, 1898, 30 Stats. 484, Chapter 489 (Ferguson Act). The pertinent portions of the Ferguson Act are herein set forth for ready reference.

"Sec. 9: . . . , the following grants of non-mineral, and unappropriated land are hereby made to said Territory for the purposes indicated, namely:

For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the improvement of the Rio Grande in New Mexico, and the increasing of the surface flow of the water in the bed of said river, one hundred thousand acres;

{\*70} Sec. 10: . . . ; and all money received on account of such sales, after deducting the actual expenses necessarily incurred in connection with the execution thereof, shall be placed to the credit of separate funds created for the respective purposes named in this Act, **and shall be used only as the legislative assembly of said Territory may direct**, and only for the use of the institutions or purposes for which the respective grants of lands are made." (Emphasis supplied)

**Asplund v. Hannett**, 31 N.M. 641, 249 Pac. 1074, reviews the treatment accorded this trust in the New Mexico organic legislation:

"By the Enabling Act (Act of June 20, 1910 [36 Stat. 557]), certain new and supplemental grants were made to the state for named purposes, and the previous grants to the territory more confirmed and expressly transferred to the state. It was therein provided that all of such lands, including previous grants, '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.' Section 28. It was further provided that the disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any other or different purpose than that specified should be deemed a breach of trust; that separate funds should be established for the several objects of the grants; and that moneys in any manner derived from any of the lands should be deposited in the fund corresponding to the grant; that no moneys should be taken from one fund for deposit in any other, or for any object other than that for which the land producing it was granted; that all such moneys should be safely invested; that the Attorney General should institute necessary or appropriate proceedings to enforce the provisions of the trust, but not to the exclusion of the power of the state, or of any citizen thereof, to enforce the same; that the state and its people should consent to all of said provisions by ordinance made, by proper reference, a part of the Constitution and by its terms positively precluding the making, by constitutional amendment, of any change in or abrogation of such ordinance without the consent of Congress.

The Constitution of this state expressly consents to all of the foregoing provisions of the Enabling Act [Art. XXI, Sec. 9, Constitution of New Mexico] and accepts the several trusts therein created. By subsequent legislation, funds have been established, known as 'permanent reservoirs for irrigating purposes, permanent fund,' and 'permanent reservoirs for irrigating purposes, income fund'."

The constitutionality of the appropriation made by the Twenty-fourth legislature has been questioned because of the provisions of Article IX, Sec. 14, of the Constitution of New Mexico. That article, in pertinent part, is quoted as follows:

"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, . . ." (Emphasis supplied)

In **State ex rel. Whittier v. Safford, State Auditor**, 28 N.M. 531, {\*71} 214 Pac. 759, it is stated as follows:

"It may not be amiss to state at the outset the general rule universally proclaimed that courts hesitate to declare statutes unconstitutional; they are enacted by a co-ordinate branch of the government, and it is always desired and preferred to give them effect. In doubtful cases their constitutionality is favored, and it is only when they are clearly violative of the Constitution that the courts so construe them."

See also **State v. Armijo**, 38 N.M. 73, 28 P. 2d 511. The New Mexico Supreme Court has even placed the requirement that a statute must be "clearly and beyond a reasonable doubt unconstitutional" before it will refuse to give effect to the same. **State v. Shroyer**, 49 N.M. 196, 207, 160 P. 2d 444.

In spite of the aforesaid pronouncements of the Court, the New Mexico Supreme Court has been extremely zealous in protecting the integrity of Art. IX, Sec. 14 of the Constitution, even though a "public purpose" be involved. **Hutcheson v. Atherton**, 44 N.M. 144, 99 P. 2d 462; **Harrington v. Atteberry**, 21 N.M. 50, 153 Pac. 1041; **State v. Hanna**, 63 N.M. 110, 314 P. 2d 714; **State Highway Commission v. Southern Union Gas Co.**, 65 N.M. 84, 332 P. 2d 1007. However, in none of the above cases was the question of the trust funds involved.

The closest the Supreme Court of the State of New Mexico has come to the problem at hand is in the case of **State ex rel. Yeo v. Ulibarri**, 34 N.M. 184, 279 P. 509. In that case, however, the Court particularly sidestepped this issue when it stated as follows:

"To what extent, if at all, the fund may be employed in aid of private or quasi public enterprises, cannot be decided until we have a case involving that question." *Supra*, 194.

In spite of the sidestepping of the particular issue, certain statements of the court in the **Ulibarri** case, supra, indicate an answer to the question of whether the State may appropriate funds from the so-called "reservoir fund" in aid of private persons or corporations. It points out that Congress in donating the lands to New Mexico under the Ferguson Act did not limit the State as trustee to any particular scheme of using the fund so long as the same was used for the purposes provided. Congress did not direct whether the funds were to be used to construct, own and forever operate irrigation works or to aid and encourage private construction and operation or to aid and encourage organized quasi public irrigation districts. The court further pointed out that "Completed irrigation reservoirs bring special benefits to the community in which they are located. That is true of any development scheme. If that fact were to exclude the state from engaging in or aiding a project, it would entirely defeat the trust." Supra, 193.

It should be particularly noted that Article IX, Section 14, excepts from the limitations therein those falling within the purview of the clause "except as otherwise provided in this Constitution". It is my opinion that that clause specifically covers the provisions of Article XXI, Section 9, of the New Mexico Constitution. That article provides for the consent of the people and the state to all and singular the provisions of the Enabling Act and to the terms and conditions of the grants under which the lands referred to therein were made. The Enabling Act, through Section 10, provided that the "funds arising from the granted lands should be used by the State for the several objects specified in the respective granting and confirmatory provisions". The Ferguson Act, supra, creating the trust, specifically provided that the trust should "be used as the legislative assembly" might direct.

It is my opinion that those {\*72} persons lawfully assembled for the purposes of drafting the Constitution recognized that limitations imposed upon the general appropriations made by the legislature would not be similarly imposed against the use of the trust funds. As the Court pointed out in the **Ulibarri** case, supra, it is impossible for the State to investigate, construct, or rehabilitate anything relating to reservoirs or irrigation purposes without benefitting a particular segment of the state wherein the money is being spent. And the Congress of the United States, in exercising its rightful jurisdiction over the trust, protected the purposes of the fund and its manner of disposition by appropriate stipulation in the Enabling Act, which stipulation was accepted by the State through its adoption of the State Constitution.

In view of the above expressions by the Supreme Court and further in keeping with the purposes for which the fund was created, I, therefore, advise you that it is my opinion that House Bill 112 adopted by the Twenty-fourth Legislature and approved by the Governor does not violate the provisions of Art. IX, Sec. 14 of the Constitution of New Mexico so long as the funds expended arise from "trust funds", and that the expenditure of said funds for the purposes outlined in the legislation will not be unlawful.

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