

## **Opinion No. 64-29**

March 9, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

**TO:** Mr. James T. Forrest, Director, Museum of New Mexico, Santa Fe, New Mexico

### **QUESTION**

#### **FACTS**

The Museum of New Mexico was given approximately seventy-nine acres of land located at Alcalde, New Mexico, together with all buildings thereon. This property was donated by Florence Dibell Bartlett to the Museum. Subsequently, the State of New Mexico by Laws 1949, Chapter 115 accepted such property on behalf of the State. Following the acquisition of this property by the State, the legislature by Laws 1951, Chapter 106, authorized the Museum of New Mexico to sell such property known as "El Mirador" ranch to the New Mexico College of Agriculture and Mechanic Arts (now New Mexico State University).

#### **QUESTION**

May the Museum of New Mexico properly invest the proceeds derived from such sale of realty to the New Mexico College of Agriculture and Mechanic Arts, in interest bearing securities so that such interest on the principal would inure to the benefit of the museum, and if so in what type of securities must the museum invest such money?

#### **CONCLUSION**

See analysis.

### **OPINION**

#### **ANALYSIS**

Pursuant to Laws 1951, Chapter 106, the state legislature authorized the Board of Regents of the Museum of New Mexico to transfer "El Mirador" ranch (donated by Florence Dibell Bartlett to the Museum) to the Museum of New Mexico. Such legislation also directed that:

"There is hereby appropriated the sum of seventy-five thousand dollars (\$ 75,000.00), which shall be paid to the state treasurer, fifty thousand dollars (\$ 50,000.00) in the 40th, and twenty-five thousand dollars (\$ 25,000.00) in the 41st fiscal year, to be invested by him as a permanent fund, the income only of which shall be used under the

direction of the Museum of New Mexico for the purpose of operating and maintaining the Museum of International Folk Art, referred to in Chapter 115 of the Session Laws of 1949."

As may be seen under the above statute, the state treasurer is designated as custodian of the moneys appropriated to the Museum of New Mexico under such act, and the state treasurer is directed by such law to invest the moneys so that the income thereof may inure to the benefit of the Museum. Although such statute does not expressly spell out the standards which the state treasurer is to apply in the investment of such fund, several other statutory provisions have application to the question presented.

Section 11-2-8, N.M.S.A., 1953 Compilation, sets out as follows:

"No moneys of this state belonging to any sinking fund or other fund, except those mentioned in the following section hereof, shall be invested by the state treasurer in any form of security without the prior approval of such investment by the state board of finance. The state board of finance, prior to approving any such investment shall make an investigation of the validity of any such security, including the authority for the issuance thereof and all proceedings leading up to such issuance, and of the adequacy of the means provided for the payment of the principal and interest of such security, and shall by resolution adopted at a meeting of said board recite its findings on all said matters."

Under the statute quoted above, the state treasurer is required to obtain the approval of the state board of finance for the investment of public funds. Section 11-2-8.4, N.M.S.A., 1953 Compilation, et seq., relates to the investment of the "permanent fund" of the State by the state investment council. However, these sections do not apply in the instant case since under Section 11-2-8.4, supra, the "permanent fund" there referred to is defined as those "funds derived from lands under the direction, control, care, and disposition of the commissioner of public lands, conferred by Article XIII, sections 1 and 2, of the Constitution of the State of New Mexico."

In our opinion, the strict standards set by the state legislature and the state Constitution for the investment of permanent funds derived from lands under the care of the commissioner of public lands may be utilized by the state treasurer and the state board of finance for determining which securities and investments are proper for the investment of the permanent funds belonging to the Museum, although certainly such enumerated investments are not controlling upon the board of finance and the state treasurer.

We believe that the state treasurer and the state board of finance in selecting proper investments for investment of such fund are subject of the "prudent man" test. This test as stated in Section 48-20-4, New Mexico Statutes Annotated, 1953 Compilation, regarding custodians of the property of minors holds fiduciaries of funds to the duty to "invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital."

The above language while specifically applicable to fiduciaries of the property of minors, in our opinion is in principle also applicable to the investment of the funds in question.

Thus, to recapitulate, it is our opinion that the state treasurer is by law required to invest the fund in question belonging to the Museum of New Mexico subject to the approval of the state board of finance as to the proper type of investment. In selecting the particular type of investments, these officers are free to choose such securities as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital. And such officers may, in their discretion, utilize the same standards as now govern the investment of public funds controlled by the state commissioner of public lands and as set forth in Section 11-2-8.13, N.M.S.A., 1953 Compilation. The board of regents of the Museum is not by statute invested with the authority to determine the type of investment that such fund will be invested in. However, certainly the recommendation of the board of regents should be given due consideration by the finance board and the state treasurer.