

Opinion No. 77-10

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OPINION OF: Toney Anaya, Attorney General

BY: Robert A. Engel, Assistant Attorney General

TO: Vincent Montoya, Director, Department of Finance & Administration

SEVERANCE TAX PERMANENT FUND: INVESTMENT BY STATE INVESTMENT OFFICER OR STATE TREASURER: STANDARD FOR INVESTMENT.-The severance tax permanent fund is not a permanent fund as contemplated by Article XII, Section 7. Therefore, the constitution does not require that the state investment officer invest the severance tax fund. The investment standard for the severance tax fund is the same as for other state funds.

QUESTIONS

1. Does Article VIII, Section 10 of the New Mexico Constitution require that investment jurisdiction over the severance tax permanent fund reside with the State Investment Officer?
2. What is the investment standard required for the investment of the severance tax permanent fund?

CONCLUSIONS

1. No.
2. See Analysis.

ANALYSIS

1. Article XII, Section 7 of the New Mexico Constitution states in pertinent part:

The principal of the permanent school fund shall be invested in the bonds of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein . . . [emphasis added]

OPINION

Prior to the constitutional amendment of 1958, Article XII, Section 7 stated in pertinent part:

"The principal of the permanent school fund shall be invested in the bonds of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein . . ." [emphasis added] {^{*103}} It is apparent to us that the 1958 amendment, which among other things, added the words "and other permanent funds," was intended to make clear that Article XII, Section 7 refers to all permanent funds which are derived from trust lands and were then in existence. Those permanent funds have been provided by statute since 1917 and are set forth at Section 71-1-16 NMSA, 1953 Comp. The reference to other permanent funds was consistent with Section 10 of the Federal Enabling Act of June 20, 1910, 36 Stat. 557. That act granted to New Mexico certain public lands to be held in trust by the state to provide for the support of its common schools and various other institutions. See *Lake Arthur Drainage Dist. v. Field*, 27 N.M. 183, 199 P. 112 (1921).

Article VIII, Section 10 was adopted by the people of New Mexico in November, 1976. That section creates a constitutional severance tax permanent trust fund. Article VIII, Section 10 states:

there shall be deposited in a permanent trust fund known as the "severance tax permanent fund" that part of state revenue derived from excise taxes which have been, or shall be, designated severance taxes imposed upon the severance of natural resources within this state in excess of that amount which has been or shall be reserved by statute for the payment of principal and interest on outstanding bonds to which severance for revenue has been or shall be pledged. Money in the severance tax permanent fund shall not be expended but shall be invested as provided by law. The Legislature may appropriate money in the severance tax permanent fund by a three-fourths vote of the members elected to each house of the Legislature. The income from investments shall be appropriated by the Legislature as other general operating revenue is appropriated for the benefit of the people of the state. [emphasis added]

The question is whether Article VIII Section 10 was meant to raise the status of the severance tax fund to that of the other permanent funds and therefore require the investment of the severance tax fund by the state investment officer. In other words, is the severance tax fund truly a "permanent" fund as contemplated by Article XII, Section 7?

Several factors lead us to conclude that the severance tax permanent fund is not a permanent fund as contemplated by Article XII, Section 7. The severance tax fund and the various land grant permanent funds are fundamentally different. The permanent funds are derived from the lands under the direction, control, care and disposition of the commissioner of public lands conferred by Article 13, Sections 1 and 2 of the Constitution of the State of New Mexico. See Section 11-2-8.4 NMSA, 1953 Comp. The derivation of the severance tax fund is entirely different. That fund derives from the excise taxes levied upon the severance of natural resources.

Furthermore, Article VIII, Section 10 specifically states that the severance tax fund corpus may be invaded by the legislature and the income derived from investment may

be generally appropriated. Quite the contrary is true for the permanent funds. See Section 7-1-17 NMSA, 1953 Comp. and *State v. {*104} Llewellyn*, 23 N.M. 43, 167 P. 414 (1918). The income from the lands granted under Section 10 of the Enabling Act was impressed with the same trust as the land itself. "That is to say, it could only be used for the support and maintenance of the common school or the institutions to which it was granted." *Lake Arthur Drainage Dist. v. Field*, supra. See advisory letter of Attorney General dated October 15, 1973. In regard to the land grant permanent funds, the New Mexico Supreme Court, in *State v. Mechem*, 56 N.M. 762, 250 P.2d 897 (1952) stated:

(Attempts to divert the) trust funds to the general funds for general purposes were clearly unconstitutional and mere nullities.

To the extent that the severance tax fund may be generally appropriated and the corpus invaded, it is not a permanent fund as contemplated by Article XII, Section 7.

Article VIII, Section 10 provides that money in the severance tax permanent fund shall be invested "as provided by law." While it is arguable that "as provided by law" means "as provided by Article XII, Section 7," we believe that conclusion erroneous. If that had been the intent of the framers of the constitutional amendment, we believe that Article VIII, Section 10 would have so provided. See, for example, Article IV, Section 27 of the New Mexico Constitution. The better result is that "as provided by law" refers to the enabling legislation regarding the severance tax fund. Section 72-18-30.2 NMSA, 1953 Comp. states in pertinent part:

Money in the severance tax permanent fund shall be invested by the State treasurer in accordance with the investment standards used in investment of the state funds and in accordance with the policy and regulations of the state treasurer . . . [emphasis added]

In light of these considerations, we conclude that the constitution does not require that the severance tax permanent fund be treated the same as the land grant permanent funds.

Nevertheless we must emphasize that any legislative attempt to transfer investment authority over the severance tax fund to the investment officer is perfectly legal. The constitution does not prohibit the investment officer from obtaining the authority over the fund. It simply does not mandate that result. If, for example, the legislature enacts House Bill 276, it will thereby change the focus of "as provided by law" in Article VIII, Section 10. Perhaps that is the preferable result if the severance tax fund is to be invested at the best possible yield. We only conclude that, in the absence of such enabling legislation, the constitution does not require that the investment officer invest the severance tax fund.

We realize that the conclusion herein stated is contradictory to the letter from this office dated February 25, 1977. Accordingly, that letter is hereby overruled and withdrawn.

{*105} 2. Article VIII, Section 10 of the New Mexico Constitution states in pertinent part:

there shall be deposited in a permanent trust fund known as the severance tax permanent fund . . . [emphasis added]

The constitutional amendment added the term "trust fund" to the description of the severance tax permanent fund. We note that the word "trust" did not appear in the severance tax fund statutes. See Sections 72-18-30.1 NMSA, 1953 Comp. et seq.

As a general rule, the trustee of a trust is bound by the "prudent man" rule in the investment of the trust fund. See Sections 33-1-1, 33-1-15 and 33-1-16 NMSA, 1953 Comp. However, Article VIII, Section 10 states that the severance tax fund "shall be invested as provided by law." Thus, we must look to Section 72-18-30.2, NMSA, 1953 Comp., supra, for the investment standard. That section states in pertinent part:

Money in the severance tax permanent fund shall be invested by the state treasurer in accordance with the investment standards used in investment of state funds and in accordance with the policy and regulations of the state treasurer . . . [emphasis added]

The question then is what is the investment standard for "state funds?" The investment standard for the land grant permanent funds is clearly set forth at Section 11-2-8.13, NMSA, 1953 Comp. That standard is the "prudent man" rule. However, there is no general statement in our statutes of the investment standard for the state treasurer in the investment of other funds.

Section 11-2-7(A), NMSA, 1953 Comp. states:

Upon the certification or designation of any bank, or savings and loan association whose deposits are insured by an agency of the United States, to receive public moneys on deposit, the state treasurer, and the several county or municipal treasurers, who shall then have on hand any public moneys by virtue of their several offices, shall make deposit of such moneys in the bank or banks whose deposits are insured by an agency of the United States, and savings and loan association or associations whose deposits are insured by an agency of the United States, designated, by the authority authorized by law to so designate, to receive such deposits of all moneys thereafter received or collected by them. [emphasis added]

Section 11-2-8 NMSA, 1953 Comp. states:

No moneys of this state belonging to any sinking fund or other fund, except those mentioned in the following Section [11-2-9] 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 {*106} 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 principal and

interest of such security, and shall be resolution adopted at a meeting of said board recite its findings on all said matters.

Thus the statutes themselves direct the treasurer as to the disposition of other state funds. In the absence of new legislation, the treasurer must invest the severance tax fund in accordance with the above statutes. This means he must deposit the fund in banks and savings and loans until the Board of Finance approves the investment of the fund in securities.

Arguably the "prudent man" rule would require the state treasurer to request Board of Finance approval if he believes investment in securities will produce greater yield consistent with safety. In other words, instead of automatically depositing all severance tax fund moneys in banks and saving and loans, the treasurer should examine the possibility of greater yield, consistent with safety, which might result from investment in securities. If he determines that greater yields are possible, he should approach the Board of Finance for the authority to purchase such securities.

In conclusion, if the legislature directs that the state investment officer invest the severance tax fund, it should clarify what investment standard he is to follow.

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