

## Opinion 12-03

**OPINION OF: GARY K. KING** Attorney General

February 1, 2012

**BY:** Susan Sita, Assistant Attorney General

**TO:** The Honorable Mimi Stewart, New Mexico State Representative, 313 Moon Street  
NE, Albuquerque, NM 87123

The Honorable Rick Miera, New Mexico State Representative, 1011  
Forrester NW, Albuquerque, NM 87102

### QUESTIONS:

(1) Would the anti-donation clause of Article IX, § 14 of the New Mexico Constitution permit the distribution of money from the land grant permanent funds to finance private or sectarian early childhood education programs?

(2) Would the anti-donation clause permit the distribution of money from the funds to a public agency or entity, such as the Children, Youth and Families Department, to finance contracts between agents of the state government and private sectarian early childhood education programs?

(3) Does the New Mexico Legislature possess the authority to enact a law or propose a constitutional amendment to:

- (a) add a private or sectarian entity to the roster of designated beneficiaries of the land grant permanent funds; or
- (b) alter the distribution of the funds to the currently designated beneficiaries to accommodate a new additional beneficiary?

(4) Would any other state or federal law or regulation impede the addition of a new, private or sectarian entity to the list of designated beneficiaries of the land grant permanent funds or impede the execution of contracts between a governmental or other public entity and a private or sectarian entity for services in exchange for money distributed from the fund?

(5) Are there any legal issues with respect to a joint resolution and proposed constitutional amendment to increase the base distribution from the land grant permanent funds by one and one-half percent for ten years in order to provide early childhood learning programs for New Mexico children younger than age five?

### CONCLUSIONS:

(1) & (2) An analysis of the effect of the anti-donation clause is not necessary at this time because the federal Enabling Act of June 20, 1910, 36 Stat. 557, ch. 310 (“Enabling Act” or “Act”) and corresponding provisions of the state constitution directly prohibit the state from using money from the land grant permanent funds for private, sectarian or denominational entities.[1]

(3) & (4) Unless Congress amends the Enabling Act, the legislature has no authority to propose amendments to the constitution or enact laws that add a private or sectarian entity to the roster of designated land grant beneficiaries. If the Enabling Act were amended to permit a new beneficiary, the legislature could propose a constitutional amendment to alter the distribution of funds to accommodate the new beneficiary.

(5) A proposed constitutional amendment to increase distributions from the land grant permanent funds for early childhood learning programs would be permissible only if the increased distributions were limited to early childhood learning programs provided by the public schools.

### **BACKGROUND:**

During the current 2012 legislative session, a senate joint resolution has been introduced that proposes an amendment to Article XII, Section 7 of the New Mexico Constitution. See S.J. Res. 9 (50th Leg., 2d Sess. 2012). The proposed amendment would increase distributions from the land grant permanent funds and allow use of the funds for early childhood education programs provided by the public schools or under contracts between the state and private entities, some of which could be based in religious institutions.

### **ANALYSIS:**

#### Without an Amendment to the Federal Enabling Act, Land Grant Permanent Funds Cannot be Distributed to Sectarian, Denominational or Private Schools

##### A. The land grant permanent funds.

The land grant permanent funds are those funds “derived from 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 New Mexico.” NMSA 1978, § 6-8-1. Article XIII, Section 1 of the New Mexico Constitution declares that all lands granted to the state by congress are public lands of the state to be held or disposed of as provided by law for the purposes for which they have been granted, donated or otherwise acquired. The land grant permanent funds are derived from the lands granted to the state by Congress in the Enabling Act and are therefore subject to the requirements of the Act.

##### B. The Enabling Act and the state constitution.

The Enabling Act set the terms by which New Mexico would be admitted as a state. See Forest Guardians v. Powell, 2001 NMCA 28, 130 N.M. 368, 372, 24 P.2d 803, 807. The state consented to all the terms of the Act in Article XXI, Section 9 of the New Mexico Constitution. Article XXI, Section 10 of the New Mexico Constitution states that “[t]his ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.”

The Act granted to New Mexico land in each township “for the support of common schools.” Enabling Act § 6. Other grants of land were made to New Mexico specifically for, among other things, “university purposes,” “schools and asylums for the deaf, dumb, and the blind,” “normal schools,” “agricultural and mechanical colleges,” a “school of mines” and “military institutes.” Enabling Act § 7. The lands granted to New Mexico and any proceeds from them are to be held in trust. Enabling Act § 10, ¶ 1. If the lands or the money derived from them are used for something other than the named purpose, it is a breach of trust. Enabling Act § 10, ¶ 2. The New Mexico Supreme Court has stated that “[s]ection 10 of the Enabling Act became a part of our fundamental law to the same extent as if it had been directly incorporated into the Constitution when thus expressly consented to by the state and its people in Article XXI, Section 9 of the Constitution.” State ex rel. Interstate Stream Commission v. Reynolds, 71 N.M. 389, 396, 378 P.2d 622, 627 (1963). “The trust is binding and enforceable and the legislature is without power to divert the fund for another purpose than that expressed.” Id.

Section 8 of the Enabling Act requires:

[t]hat the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

Section 7 of the Act further states that the permanent school fund of the state “shall be used for the maintenance of the common schools of said State.”[2]

The New Mexico Constitution contains the same limitations as the Act and specifically mentions private schools:

[t]he schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

Article XII, § 3 (emphasis added).

The Enabling Act and the New Mexico Constitution require that schools receiving land grant funds must remain under the exclusive control of the state and prohibit the distribution from proceeds of the sale or disposal of land granted for educational purposes to a sectarian, denominational or private school, college or university. Accordingly, a public school under the control of the state can receive funds, but a private school not under the exclusive control of the state cannot.

We believe the Enabling Act's and constitutional prohibitions apply to indirect as well as direct land grant fund distributions. The prohibitions cannot be avoided by appropriating the funds to a state agency to, in turn, distribute or contract with a sectarian, denominational or private school not under the exclusive control of the state. Such a scheme would simply be an artificial attempt to circumvent the prohibitions of the Act and state constitution. Regardless of the number of intervening state entities, the transaction would still amount to the use of permanent fund money for the support of private or sectarian schools contrary to the prohibitions of the Enabling Act and state constitution.

Because it is now prohibited by federal law and the state constitution, the distribution of land grant funds to a private, sectarian or denominational school would require amendments to the Enabling Act by the United States Congress and an amendment to the state constitution proposed by the legislature and adopted by the state's voters.[3]

#### The State Constitution May be Amended to Make Distributions from the Land Grant Permanent Funds to Public Schools for Early Childhood Learning Programs

Distributions from the land grant permanent funds may be increased and used for the support of early childhood learning programs, provided the funds go to public schools and the increased distribution is accomplished by amending Article XII, Section 7 of the state constitution.

As discussed above, the Enabling Act dictates that the schools provided for must be public schools under the exclusive control of the state. However, the Act does not prescribe how the funds are to be divided among public school institutions or the amount of the percentage distribution from the funds. Instead, distributions from the funds are governed by Article XII, Section 7 of the New Mexico Constitution. In 1996, New Mexico voters adopted amendments to Article XII, Section 7 regarding investment and distribution of the fund. The United States Congress subsequently approved the amendments to the state constitution and made requisite amendments to the Enabling Act. One of the amendments changed Section 10 of the Act to read: "[d]istributions from the trust funds shall be made as provided in Article 12, Section 7 of the Constitution of New Mexico."

Therefore, changes to exactly how the funds are distributed may be made as long as it is accomplished by an amendment to Article XII, Section 7 and the funds are used for the purposes allowed in the Enabling Act. Because the Enabling Act currently limits the use of land grant permanent funds to the support and maintenance of public schools

and prohibits their use for private, sectarian and denominational schools, the use of any increased distribution for early childhood learning programs is limited to programs provided by the public schools.

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[1] If the Enabling Act and state constitution were amended to expressly permit the state to finance a private or sectarian entity with land grant permanent funds, the anti-donation clause's prohibition against grants of public money to private individuals and entities would not apply. See Denish v. Johnson, 1996 NMSC 5, ¶ 32, 910 P.2d 914, 922 (constitutional provisions should be read together and harmonized if possible, "rather than [construed] as groupings of isolated and discordant rules").

[2] The Enabling Act uses the term "common schools" which is synonymous with "public schools." See, e.g., Andrus v. Utah, 446 U.S. 500, 506 (1980) (using the terms "common schools" and "public schools" interchangeably); Board of Education v. Corey, 163 P. 949, 953 (Okla. 1917) ("the phrase 'common schools' being synonymous with 'public schools'").

[3] If both the Enabling Act and the state constitution were amended to allow for distribution to entities other than public schools, then NMSA 1978, § 19-1-17 would also have to be amended to include an additional beneficiary.