

Opinion No. [29-103]

May 22, 1929

TO: Office of the Attorney General of New Mexico

STATE BOARD OF FINANCE -- May issue debentures anticipating funds to be derived from sale of lands granted by Act of Congress of May 28, 1928. § 111-601 to 612, Code 1929.

OPINION

This will serve as an acknowledgment and reply to yours of the 15th inst. transmitting to this office a copy of an opinion rendered by Messrs. Pershing, Nye, Tallmadge and Bosworth, of Denver, Colorado, on House Bill No. 2, adopted by the Ninth Legislature of New Mexico, and the proceedings of your board thereunder, looking toward the issuing of debentures anticipating funds to be derived from the sale and proceeds of 250,000 acres of land granted the State of New Mexico by the act of Congress approved May 28, 1928, and transmitting also a copy of the resolution passed by your board May 15, 1929, requesting that this office institute court proceedings against your board to enjoin you from issuing such debentures, to the end that your authority so to do may be fully determined by the supreme court of the State of New Mexico.

The opinion of the bond attorneys above referred to expresses a doubt as to the power of the board to issue the proposed debentures principally because of interest which will accrue on such obligations. Certain practical questions also are suggested, questions not necessarily affecting the validity of the debentures, but of importance to prospective purchasers. We do not deem it within our province to meddle in these strictly business questions, for which reason this opinion is confined to the one legal question raised, that is, the power and authority for the issuing of interest-bearing debentures to be redeemed out of a trust fund derived from lands granted the state for the purposes specified in the act of Congress above referred to.

Inasmuch as Mr. Seth and your Mr. Gilbert both have easy access to the several acts of Congress to be herein mentioned, to the Constitution of the State of New Mexico, to House Bill No. 2, approved Feb. 11, 1929, and to the several court decisions to which reference may be made, it will not be necessary to quote at length from any of them nor to extend this opinion to the proportions of a brief.

The grant of 250,000 acres to the State of New Mexico by Congress in trust by the act of May 28, 1928, and accepted by the state by the act approved Feb. 11, 1929, was for certain specified purposes: (a) for the reimbursement of Grant, Luna and Hidalgo Counties for interest paid by said counties on the bonds of Grant County; (b) for the reimbursement of Santa Fe County for interest paid by said county on the bonds of Santa Fe County; (c) for the payment of the principal of the bonds issued by the town of Silver City; (d) to reimburse the town of Silver City for interest paid by said town on said

bonds, the bonds referred to in each instance being bonds validated, approved and congrmed by act of Congress of Jan. 6, 1897, and it being further provided that, if there shall be any surplus it shall become a part of the permanent school fund of the state.

Provision is made in section 2 of the act governing the manner of selection, lease and sale of the lands granted.

Section 3 of the act places upon the state of New Mexico, through its State Board of Finance, the duty and responsibility of determining (a) the amount of money necessary for wiping out these financial obligations, and (b) the manner of liquidating the same.

A careful study of House Bill No. 2 discloses that the legislature, in accepting the grant made by Congress, has meticulously followed the act of Congress, even to the extent of adopting the language of Congress as to all things specified. The bill has been carefully and skillfully drawn to effect the purpose and carry out the intent expressed by Congress in creating this trust. On at least two occasions prior to this Congress has endeavored to be of assistance to the State of New Mexico in the matter of wiping out this bonded indebtedness and of reimbursing some of the counties for moneys expended in connection therewith. By section 7 of the Enabling Act, approved June 20, 1910, reference is made to bonds and accrued interest thereon issued by Grant and Santa Fe Counties, being the same bonds as those provided for at this time, and a grant of 1,000,000 acres was made. An effort was made by the first state legislature to carry out the intent of Congress in this respect, but in a suit brought to test the validity of a bond issue it was discovered that the terms of the grant were not broad enough to cover other than subsisting debts of the counties and not interest or principal, which had, in fact, been paid. Congress again, on June 5, 1920, passed an act permitting the state to divert funds arising from the grant mentioned in the Enabling Act from the original purpose, so as to cover not only the subsisting debts of the counties, but also the interest and principal which had been paid by the counties and by the town of Silver City. In another suit, *Bryant v. Board of Loan Commissioners*, 211 Pac. 597, it was held that the permission of Congress was insufficient to empower the state legislature to reimburse the two counties and the town of Silver City because of a provision in our state Constitution, section 10, article XXI, which made necessary an amendment of the Constitution itself, in addition to the permission of Congress and before the funds could be applied to any purpose different from that expressed in the original grant. This is a case referred to by the bond attorneys whose opinion you have, but in our judgment it is without application here for the reason that the grant made last year is not subject to the same restrictions, and for the further and more potent reason that there is, in the issuing of debentures such as are proposed by your board, no attempt at diverting and no diverting of trust funds from the specific purposes enumerated in the grant from which such funds arise. It is on this proposition that our final decision rests, it being conceded that the fund to be derived from the lands granted by the act of Congress of May 28, 1928, is a trust fund and can not legally be used for any object other than that for which such fund was created, the object or objects in this instance being the liquidating of the amounts found due the counties and town hereinbefore referred to by the Finance Board as provided in the act of Congress.

The responsibility and duty of determining the several amounts due and the manner of liquidating the same have been placed upon the State of New Mexico and its State Board of Finance by section 3 of the act of Congress, which section reads as follows:

"Sec. 3. Said State of New Mexico through its State board of finance shall determine the interest paid by said counties on said indebtedness, and the **manner of liquidating the same**, and likewise the amount of the principal due on the bonds issued by the town of Silver City, and the interest paid by said town **and the manner of liquidating the same.**"

The thing to be accomplished in the administering of this trust is the extinguishment of the obligations enumerated, and the manner of liquidating the same is left to the State Board of Finance, both by the act of Congress and the act of the legislature. Nothing is said in the act of Congress as to the expenses to be incurred in connection with the selection of lands, the sale, the ascertainment of amounts due or the liquidating of the obligations. In this connection a case pertinent and helpful is *United States v. Swope*, 16 Fed. (2d) 215, wherein a number of authorities are cited. For the purposes of this letter a few brief quotations will be sufficient.

"It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges, and expenses incurred in the execution of the trust!"

"Independently of the provisions of this section, I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any of the parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust. Such is the rule of this court, and such also is the rule at common law'."

There is a temptation to quote at considerable length from this opinion but, as above stated, this is not a brief and the printed opinion is easily available for your study. Congress having delegated, to the State of New Mexico, through its State Board of Finance, power, authority and the duty of determining the manner of liquidating the debts for which the trust was created, we are of the opinion that the State Board of Finance, even without specific suggestion from the legislature, was well within that power in adopting, as the manner of liquidating, the debentures proposed by the board. This being our opinion, the opinion of your board and, as we understand it, the opinion as well of the special bond attorneys, who express a hope that the supreme court of the State of New Mexico would eventually pass favorably upon this question and others, we feel that it would be inconsistent with the policy of this office to institute court proceedings against the State Board of Finance to enjoin them from issuing such debentures, as requested in your resolution of May 15, 1929. To this we might add that, in suits attacking the constitutionality of a statute, all presumptions are in favor of its

constitutionality and courts are very slow to hold a statute unconstitutional unless convinced beyond a reasonable doubt.