Opinion No. 41-3928

October 22, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Rex French State Treasurer Santa Fe, New Mexico

*{*111}* In your letter dated October 21, 1941, you ask for an opinion from this office relative to your authority to continue to purchase state securities with moneys in three classes of funds, namely, state moneys, permanent school funds and other institutional land grant funds, in view of the recent opinion of the Supreme Court in the State Office Building case.

In this opinion, in dealing with contracts in the nature of lease agreements between state agencies, the Court held that such contracts could not be valid because only one party was involved, being the state itself. However, in using this language, I do not believe that the Supreme Court intended to overrule its previous decisions or to hold invalid provisions of the Enabling Act and the State Constitution, and for that reason, I believe there is a distinction between contracts in the nature of lease agreements and contracts involved in the investment by the State Treasurer of state funds or trust funds in state *{*112}* securities.

In at least three different cases the State Supreme Court has discussed the investment by the Treasurer of permanent school funds in state securities as authorized under Article XII, Section 7 of the State Constitution, and in all these cases the court has heretofore approved this procedure.

Section 10 of the Enabling Act, in dealing with funds derived from land grants, which would include the permanent school fund, also, the institutional land grant funds, requires the State Treasurer to invest such moneys in this language:

"The State Treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the Governor and Secretary of State." * * *

Article XII, Section 7 of the State Constitution provides as follows:

"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. The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must be first approved by the governor, attorney-general and secretary of state. All losses from such funds, however occurring, shall be reimbursed by the state."

In State v. Marron, 18 N.M. 426, in construing an act of the Legislature authorizing the State Treasurer to deposit moneys in the permanent school fund in banks, it was held that such act was unconstitutional as being beyond legislative authority to control discretion given to the State Treasurer, Governor, Attorney General and Secretary of State in selecting securities for investment. However, this case recognizes the mandatory duty of the Treasurer to invest such funds according to the terms of the Enabling Act and Section 7, Article XII of the Constitution.

In State v. Graham, 32 N.M. 485, the Supreme Court passed upon Chapter 4, Laws of 1927, which authorized the Treasurer to invest moneys in the permanent school fund and any other public funds, in highway debentures. In view of the fact that said statute was passed by a three-fourths vote of the members of each house, the court held that the same complied with the constitutional requirement in Section 7, Article XII, and upheld an investment by the State Treasurer from such funds in highway debentures.

In State v. Watts, 34 N.M. 451, the court recognized the prohibition in the Constitution against the Treasurer investing moneys in the permanent school fund in any securities except bonds of the State of New Mexico or of any county, city, town, board of education or school district therein, unless such additional investment is authorized by a three-fourths vote of the members of each house.

In all of these cases the right of the Treasurer to invest in state securities is recognized and approved, and in fact, it is recognized that the Treasurer cannot deposit money of the permanent school fund in banks as an investment, or invest the same in any other manner than as is required under the Enabling Act and the Constitution.

Under the Enabling Act, the *{*113}* Treasurer may invest the funds derived from institutional land grants in "safe interest-bearing securities." This language is broad enough to include any state securities approved by the Governor and Secretary of State, and since the investment by the Treasurer is required to be made in state securities under the Constitution insofar as the permanent school fund is concerned, certainly there can be no objection to an investment in such securities from the institutional land grant funds when such investment is approved as required in the Enabling Act.

As to state funds not held as trust funds, the Legislature has exclusive control thereof and can direct the manner of their investment. In Chapter 4, Laws of 1927, construed in the case of State v. Graham, supra, the Legislature specifically authorized the use of any other public funds in purchasing highway debentures.

I do not believe that the language used by the court in the State Office Building Commission case against E. D. Trujillo was intended to overrule the line of decisions above mentioned, and the requirements of the Enabling Act and the Constitution.

Section 10 of the Enabling Act makes it the duty of the Attorney General of the United States to prosecute in the courts of the United States proceedings at law or in equity to

enforce the provisions of the Enabling Act. Although there is nothing in the Enabling Act authorizing the state to loan to itself the trust moneys in its hands, I anticipate no objection on the part of the Attorney General of the United States to such procedure, in view of the fact that the United States throughout its existence has recognized its power through the Congress to authorize binding contracts between agencies of the government created by it.

This office does not construe the opinion in the State Office Building Commission case as preventing you from following the established practice of dealing with any state agencies having bonds or debentures to sell such as the Compilation Commission and the Highway Department. If anyone should bring suit against you by reason thereof, I feel certain that the Supreme Court, in rendering an opinion in such suit, would modify the language which is now giving you some concern, inview of the court's previous rulings with respect to such investments and of the authority in other jurisdictions. Contracts of numerous kinds have been entered into between agencies of the Federal Government where authorized by Congress.

In Pennsylvania thirty-year leases by the state to a building authority have been approved, and the bonds issued by that authority on projects aggregating millions of dollars for state office buildings, schools, armories and hospitals, have been purchased by still another agency of the state, and that agency is being paid four per cent per annum thereon by the first agency. The same thing is true in Texas where two year leases have been approved by the courts between the state and the armory board, an agency of the state.

Trusting that the foregoing sufficiently answers your inquiry, I am,