

Opinion No. 46-4949

September 10, 1946

BY: C. C. McCULLOH, Attorney General

TO: State Board of Finance Santa Fe, New Mexico

{*271} At the meeting of the State Board of Finance on August 21, 1946, the New Mexico School of Mines requested approval of the issuance of \$ 485,000 Building and Improvement Bonds, generally understood to be revenue bonds, payable from the land revenues of the School, and also rentals of the buildings. The School contemplates acquiring improved real estate which the Federal Government is now leasing for purposes of carrying out a Navy project.

Originally, the School contemplated issuing the bonds under the provisions of Chapter 177, Laws of 1939. However, it is my understanding that the District Court in Albuquerque has recently ruled that bonds for the purchase of improved real estate cannot be issued under the provisions of the foregoing law.

The Board of Finance has requested our opinion on two questions: first, whether the Board of Regents of the School of Mines can legally issue such building and improvement bonds in the absence of an Enabling Statute, and, second, whether the state treasurer can legally invest permanent funds in such bonds, if issued.

The Board of Regents is a corporate entity and is given broad powers as set forth in Sections 55-2602, 55-2606 and 55-2821 of the 1941 Compilation. It is possible that under their broad corporate powers the Board of Regents could legally issue bonds without a specific Enabling Act for that purpose. The weight of authority from other states seems to so hold. (See *State v. Regents of University System*, 175 S. E. 567, 179 Ga. 210; *Caldwell Bros. v. Board of Supervisors*, 147 So. 5, 176 La. 825; *State v. State Board of Education (Montana)* 62 P. 2nd 330; and *State ex rel Wilson v. Board of Education of Montana*, 56 P. 2nd 1079.

However, at least one case has held that a public corporation, without express authority, cannot issue bonds and pledge its property as security. (*Alabama College v. Hartman*, 175 So. 394, 234 Ala. 446). Our own state court has never passed upon this particular question and therefore it is impossible to say, with certainty, what the supreme court might decide if the question were properly before it. However, in the case of *State v. Regents of the University*, 32 N.M. 428, the court uses this language:

"We have, then, a case where a grant of lands has been made to the state as trustee for the use and benefit of the University as beneficiary, the income {*272} whereof may be used by the University **in such manner as the state may by law provide**, subject always to the restrictions of the congressional legislation, if any there are."

In the case entitled: State Office Bldg. Com. v. Trujillo, 46 N.M. 29, where a public corporation contemplated the issuance of bonds to build an office building, the court uses this language:

"And, in the case of enterprises authorized by the Legislature to be embarked upon through state agencies, a particular scheme of financing will be held to be valid only where it is clearly demonstrable from the specific terms of the financing proposal itself that no tax burden or pecuniary liability of the state to appropriate or pay for the indebtedness about to be incurred will ever arise, or be looked to as security, in whole or in part, for repayment of the borrowed moneys."

And, later on, to the same effect, this language is used:

"And to show that for such an obligation to come under the special fund doctrine, the creation of the obligation **and the law authorizing it** must specify and set out the sources for payment thereof, and thereby disclose that no part of the payment is to be obtained from general taxation."

From this language it might be inferred that a specific enabling act is required for the issuance of bonds under the plan of financing contemplated by the School of Mines. At least I am unable to say that the legality of the issuance is free from doubt.

Upon the question as to the authority of the State Treasurer to purchase the bonds if they are legally issued: Art. 12, Sec. 7 of the New Mexico Constitution authorizes the Treasurer to invest the permanent school funds in bonds of the State or Territory of New Mexico, or of any county, city, town, board of education or school district; and further authorizes the Legislature by a three-fourths vote of the members elected to each house, to provide that said funds may be invested in other interest-bearing securities.

Section 8-118 of the 1941 Compilation, in the last sentence, places the same limitation upon the investment of other permanent funds as the Constitution places upon the permanent school funds. Therefore, it becomes apparent that unless the contemplated bond issue constitutes bonds of the state, that the Treasurer is not authorized to invest permanent funds in the same. The authorities from other states, and the case above cited -- State v. Board of Regents, all hold that revenue bonds of educational institutions are not bonds of the state. It is only for the reason that they are not bonds of the state that they may be issued without a vote of the people.

Since these contemplated bonds are not bonds of the state, therefore, in my opinion, the State Treasurer cannot legally invest permanent funds in such securities.

Since the Legislature will shortly be in session, I strongly recommend that an Enabling Act, specifically authorizing the issuance of such bonds and authorizing the state treasurer to purchase the same, be submitted to the Legislature for its early consideration.

I have no doubt that the proposed acquisition of the improved real estate by the School of Mines is a worthy project.