Opinion No. 56-6383

February 6, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. E. S. Walker, Commissioner of Public Lands, State Land Office, Santa Fe, New Mexico. Attention: Legal Division

Re: Middle Rio Grande Conservancy District and State Trust Lands therein.

OPINION

You have requested for our opinion the questions:

1. May the Legislature appropriate from the Land Office Maintenance Funds moneys for the purpose of payment of assessments attempted to be made by the Middle Rio Grande Conservancy District on State Trust Lands within that district?

2. If the above question is answered in the negative, may the State Board of Finance transfer from the General Fund to the Middle Rio Grande Conservancy District funds sufficient to pay Middle Rio Grande Conservancy District assessments on State Trust Lands within that district under the authority of Section 75-31-14, N.M.S.A., 1953?

The questions above are prompted by the receipt by the Land Commissioner from the Middle Rio Grande Conservancy District of a certificate of levy of assessments for the year 1955 on State Trust Lands within the Middle Rio Grande Conservancy District.

The 1955 Legislature appropriated $ 4.87 for payment of Middle Rio Grande Conservancy District assessments from funds of the State Land Office. Section 3, Chapter 287, Laws of 1955.

This office is of the opinion that the Legislature does not possess the power to appropriate State Land Office Trust Funds for the purpose of paying conservancy district assessments. Such an appropriation contravenes the provisions of the Enabling Act as accepted by this State in our Constitution.

A like question was passed upon by our Supreme Court in Lake Arthur Drainage District vs. Field, 27 N.M. 183. There it was determined that a statute directing the Land Commissioner to issue vouchers payable out of income derived from Trust Lands for the payment of drainage district assessments was unconstitutional. The case is bottomed upon the theory that the Legislature has no power to improve, as distinguished from protecting Trust Lands, and pay for such improvements out of Trust Funds.

". . . The language of the Enabling Act clearly shows that it was not the intention of Congress that the state was to have the power to improve the lands at the expense of the lands or income derived therefrom . . . ." Lake Arthur Drainage District vs. Field, supra, at page 193.

See Ervien vs. U.S., 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 and State vs. Mechem, 56 N.M. 762.

At this point it may be noted that Congress on April 1, 1926, a date subsequent to the decision in Lake Arthur Drainage District vs. Field, supra, amended Section 10 of the Enabling Act. 44 U.S. Statutes 228. That amendment would allow income from Trust Lands to be used for payment of drainage district assessments. That amendment is contained in paragraph 2 of Section 10 of the Enabling Act as follows:

"Provided, however, that the State of New Mexico, through proper legislation, may provide for the payment, out of the income from the lands herein granted, which land may be included in a drainage district, of such assessments as have been duly and regularly established against any such lands in properly organized drainage districts under the general drainage laws of said state."

However, we are unable to find that the people of this State have consented by constitutional amendment to the amendment of Congress to the Enabling Act above. Although the amendment to the Enabling Act by Congress states that provision for payment may be made "through proper legislation" it seems to us that proper legislation means a constitutional amendment and not merely a statute passed by our Legislature. This conclusion is drawn from Bryant vs. Board of Loan Commissioners of New Mexico et al., 28 N.M. 319. The following from that case which passed upon a similar situation is self explanatory.

"Appellants contend that, even admitting the soundness of our conclusion thus far arrived at, the Legislature of the state has power to accept the new grant by Congress made by the Act of June 5, 1920, above quoted. In this, however, they are clearly in error. Thus in a portion of section 2 of the Enabling Act it is to be seen that Congress contemplated that any change in regard to the use of the proceeds of the lands granted to the state should be effectuated by amendment to the Constitution, and the Constitution, in section 10 of article 21, provides that the ordinance accepting these grants of land is to be irrevocable without the consent of the United States and the people of the state, and article 19 of the Constitution provides the method whereby any change in the use and application of the proceeds of these land grants may be effectuated, and prescribes that it shall be done by way of a constitutional amendment. We now have the consent of Congress to change the application of these proceeds, but we have not a constitutional amendment whereby the same can be carried into effect. In this lies the fatal defect in the position taken by appellants." Bryant vs. Board of Loan Commissioners, et al, at page 328.

Therefore, we view the state of the law as that existing at the time that Lake Arthur Drainage District vs. Field, supra, was decided and thus income from Trust Lands may not be used to pay for assessments for improvements such as those of the Middle Rio Grande Conservancy District. Your first question is answered in the negative.

Having answered your first question negatively, the inquiry in the second question must thus be answered.

Section 75-31-14, N.M.S.A., 1953, pertaining to conservancy district assessments on certain state lands provides:

"(1) Whenever there shall be included in any district public lands belonging to the state of New Mexico subject to entry or which have been entered, and for which no certificates of purchase have been issued, such lands are hereby made and declared to be subject to all of the provisions of this act to the same extent and in the same manner in which the lands of a like character held under private ownership are or may be subject.

(2) All notices required to be given under this act shall, as soon as such notices are issued, be served upon the commissioner of public lands of the state of New Mexico by mailing to his office a copy thereof, enclosed in a sealed envelope, with postage prepaid.

(3) On all books and records of the district, the words state lands shall be used in the places therein provided for the name of the owner of lands, but in all other respects the said books and records shall be kept as though the described lands were privately owned.

(4) Upon the confirmation of any assessments against lands of the state that portion of the records relating to state lands, properly signed by the president and with the seal of the district thereunto affixed and attested by the signature of the secretary, shall be delivered by the secretary to the commissioner of public lands. It shall be the duty of the commissioner of public lands to receive the same as a record of the assessment of the said district against the said lands and the said record shall be the authority of the commissioner of public lands to demand and receive the assessments due the district as found in the same.

(5) The commissioner of public lands shall enter on the books of his office, against each description of such state lands, the amounts of assessments thereon, and shall certify the same to the state auditor, who shall draw a warrant on the state treasurer therefor, to be paid out of any funds in his hands not otherwise appropriated. Such warrant shall be forwarded by the state auditor to the treasurer, and shall by him be applied in payment of such assessments and by him be credited to the proper funds of the district. No patent shall issue for such lands until the amount of all such assessments with interest at seven per cent (7%) has been paid. No public lands which were unentered at

the time any assessment was levied against the same by any district shall be sold for such assessment."

Several difficulties in interpreting the above section are apparent. The existence of these was noted in Cater vs. Sunshine Valley Conservancy District, 33 N.M. 583, although the Court did not undertake to interpret the section nor did it disclose what these difficulties might be.

Now it can certainly be admitted that the Legislature may, if it so desires, authorize the payment of conservancy district assessments against State Trust Lands from the General Fund, or as in the above statute provided, ". . . funds in his (treasurer's) hands not otherwise appropriated . . . ." This office takes the view that the Legislature by the above section did exactly this, but the Legislature also attempted to do more. It was the attempt to do more that casts doubt on the validity of the entire statute.

Firstly however, one other matter must be resolved. The statute provides that the Act applies to ". . . public lands belonging to the state of New Mexico **subject to entry or which have been entered, and for which no certificates of purchase have been issued,.** . ." (Emphasis ours). We are informed that the State owns no lands which are "subject to entry" in the sense that, for example, the public domain of the United States was subject to entry under homestead laws. Certainly common school and institutional trust lands are not "subject to entry" as this phrase is ordinarily used. However, since this office is compelled to give any law passed by the Legislature, if at all possible, a valid and reasonable construction, we take the view that the Legislature, not intending to do a useless act, meant to include, under the provisions of the statute above, the lands held in trust by this State. The phrase ". . . and for which no certificates of purchase have been issued, . . ." may lend support to this conclusion. Ordinarily certificates of purchase were not issued to those who made "entry" on lands which were "subject to entry". The homestead right, upon perfection, was followed by the issuance of a patent. Thus it is, or so we view it, that the "certificates of purchase" phrase in this statute designates state lands which are the subject of sale. This then points to State Trust Lands under the control of the State Land Commissioner. The statute then, in our opinion, was meant to apply to such lands.

There are parts in the remainder of the statute which are questionable as concerns constitutionality and violation of our Enabling Act. For example, the statute provides that no patent shall issue until the amount of all assessments has been paid. It is conceivable that this provision may be a burden on these lands, the placing of which may be prohibited by our Enabling Act and Constitution.

Further, the statute provides that it applies to state lands as if the state lands were held in private ownership and that the remainder of the provisions of the Conservancy District Act applies to these state lands. Section 75-30-15, N.M.S.A., 1953, a part of the Conservancy District Act, provides that the assessments shall be a perpetual lien against such lands. A serious question exists as to whether or not that lien may attach to State Trust Lands.

However, this may be, and although we entertain serious doubt on the validity of the entire statute, we are forced to take the view that if any part of the statute above is invalid, then that part is severable and the remainder stands.

Viewing it thus, and as mentioned above, it is our opinion that the State may pay for such assessments from the General Funds on State Trust Lands; we therefore, believe that the Board of Finance may transfer from the General Fund to the Middle Rio Grande Conservancy District sufficient moneys to cover the assessments on State Trust Lands within that district under § 75-31-14, N.M.S.A., 1953.

Your second question is thus answered in the affirmative.

It might be suggested that since serious difficulty in interpreting the above statute exists and since we entertain doubt on its validity you should, if possible, undertake a declaratory judgment action to test it. And further, if you deem it advisable, we suggest that the attention of the Legislature be called to the fact that we have no Constitutional Amendment accepting the Act of Congress of April 1, 1926, supra, consenting to the payment of assessments of drainage districts from Trust Funds. When and if the Legislature considers this, the further problem may be gone into as to whether that consent which expressly applies to drainage districts extends also to conservancy districts.

I trust the above answers your inquiries.

By: Santiago E. Campos

Assistant Attorney General