

Opinion No. 58-112

June 2, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: Mr. S. E. Reynolds, State Engineer, P. O. Box 1079, Santa Fe, New Mexico

QUESTION

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May the State Engineer's Office purchase a building presently leased by the said office from funds now available in Rio Grande Improvement and Water Reservoirs Permanent and Income Funds by any of the following methods:

1. Paying for the building from the Water Reservoirs Income Fund without reimbursement to the Fund?
2. Paying for the building from the Water Reservoirs Income Fund and then reimbursing the fund from the Administrative Fund over a period of ten years?
3. Have the State Treasurer invest some of the Permanent Fund moneys in the Rio Grande Improvement Fund and the Water Resources Fund in the building?

CONCLUSIONS

1. No.
2. No.
3. No.

OPINION

ANALYSIS

The State Engineer's Office is currently leasing a building which houses its Roswell Office with option to purchase the said office building for a consideration of \$ 110,000.00. The State Engineer's Office is now leasing the building for \$ 12,773.00 annually. Purchase of the building would result in a large saving to the State Engineer's Office at the present time and would result in giving the State of New Mexico title to the property.

As indicated above in the question, three methods for purchasing the building have been suggested by the State Engineer's Office. We will answer these questions in their order of presentment.

The first proposal is that the building be purchased from funds in the Water Reservoirs Income Funds without reimbursement to the fund which has a current cash balance of \$ 761,919.67. This fund was accumulated from the sale of lands granted to the State of New Mexico by the United States Government in the Ferguson Act (30 Stat. 484) in 1898 and confirmed in the Enabling Act in 1910. The Ferguson Act provided that the moneys received on account of sales should be placed to the credit of separate funds created for the respective purposes named in the act and shall be used only as the Legislative Assembly of the said Territory shall direct and only for the purposes for which the respective grants were made. *Asplund v. Hannett, et al.*, 31 N.M. 641. The purpose named in the act is "for the establishment of permanent water reservoir for irrigation purposes." The trust is binding and enforceable and the Legislature is without power to divert the fund for another purpose than that expressed. *State ex rel. Yeo v. Ulibarri*, 34 N.M. 184: This brings us to the fundamental question raised, to-wit, may the State of New Mexico use the Trust Fund to purchase office space for the State Engineer's Office in Roswell, New Mexico.

There is no question by statute that the Interstate Streams Commission may expend money in carrying out the purposes of the trust for which the lands were granted to the State (§§ 75-34-1 to 75-34-6, N.M.S.A., 1953 Comp.). In Attorney General's Opinion No. 5682, this office approved the purchase of living quarters for a water master since it was reasoned that the purchase was deemed necessary in order to utilize and conserve the waters of the State. This office also held in Attorney General's Opinion No. 5792 that an appropriation to the State Engineer for his salary and other administrative expenses of his Department could be made from the Reservoirs Fund pursuant to Chapter 156, § 1, Laws of 1955. This allowance was made because, as the opinion expressed, "the many duties imposed upon the State Engineer and Interstate Streams Commission are all related to the water economy of the state and it is impossible to determine, without more facts, what proportion, if any, of the administrative expense should be charged to any one fund."

The foregoing opinion seems to state further that the appropriation was legal and proper because the amount appropriated apparently would be used to further the purpose of the trust.

In the instant case, however, the contemplated purchase will house the entire State Engineer's office in Roswell and will result in administrative benefits directly to the State Engineer's office. We are well aware that the Engineer's Office performs, in part, a function which directly benefits the maintenance of "the establishment of permanent water reservoirs for irrigation purposes", the purpose of the trust. We are also cognizant of the language expressed by our Supreme Court in *Yeo v. Ulibarri*, supra, where the Court held in effect that the purposes for which the Trust Funds were granted were very broad and that a liberal construction must be given to the provisions of the trust. In the

instant case, however, the total cost of purchasing the building would be taxed against the Water Reservoir Fund when obviously the building could not and would not be used solely for that purpose.

We have found no cases directly in point on this question. It is apparent, however, that the State Engineer's Office and the Interstate Streams Commission are charged with the duty, as trustees, to spend the money for the purpose for which the grant was made. It is our opinion, therefore, that proposal No. 1 to purchase a building for the State Engineer's Office will be diverting funds, at least in part, for purposes other than for which the grant was originally made and we accordingly answer in the negative to said proposal No. 1.

The second proposal contemplates paying for the building out of the Water Reservoirs Income Fund and then reimbursing the fund over a period of ten years. It is true this proposal would eventually return the funds to the trust, but would nevertheless result in an immediate use of the fund, which, as we indicate in answer to proposal No. 1, is neither legal nor proper and would constitute a misuse of the Trust Fund.

Proposal three would have the State Treasurer invest some of the permanent Rio Grande Improvement Fund and Water Reservoirs Fund in the building, thereby resulting in a higher return than is now being paid on investments currently being made by the State Treasurer. The State Treasurer is limited by law in investing land grant and other trust funds to certain bonds, notes and debentures of the United States Government, or to State Highway Debentures. Obviously proposal three does not constitute such an investment and accordingly we are of the opinion that proposal three must also be answered in the negative.

It is suggested that a leasepurchase be considered, if such would be satisfactory to the parties concerned. Inasmuch as the State Engineer's Office is now paying rent on the building, there could be no objection to the execution of such a contract. It would be highly practical and desirable that such rental payments be applied to the purchase price of the property which eventually would then belong to the State. The foregoing purchase plan was approved by this office in Opinion No. 6444 and a copy of the same is attached.