Opinion No. 58-169

August 14, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F Pyatt, Assistant Attorney General

TO: Honorable S. E. Reynolds, Secretary, New Mexico Interstate Stream Commission, Santa Fe, New Mexico

QUESTION

QUESTIONS

"Under the provisions of Chapter 80, Session Laws 1957, the Interstate Stream Commission is given authority to make loans to certain agencies therein described for certain purposes. * * *

1) Can the Commission make a loan to a municipal corporation for the purposes described in the act pursuant to contract guaranteeing repayment of the loan to be entered into by the Commission and the municipal corporation either with or without the issuance of revenue bonds by the municipal corporation to guarantee the loan?

2) Can the municipal corporation borrow from the Interstate Stream Commission under the circumstances described in question 1 above?

3) Would a loan to a municipal corporation to be used to repay monies already received from the State Board of Finance and expended in the rehabilitation of an existing project as defied in the act be a loan authorized under the act?

4) Is a loan to an Artesian Conservancy District created under Laws 1931, Chapter 97 (75-13-1 to 75-13-21) of funds which would in turn be loaned to landowners for water conservation work within the District authorized under this Act?

5) Would the municipal corporation in question 3 or the quasi-municipal corporation in question 4 have the authority to borrow the funds for the uses as therein outlined?

6) Would a loan of monies to an Irrigation District for use in establishing a water storage reservoir be authorized under this Act?

7) Would a loan to an Irrigation District to rehabilitate a water storage reservoir and the works leading to and from it be authorized under this act?"

CONCLUSIONS

1) Yes, so long as trust funds are not involved.

2) Yes.

3) Yes, so long as trust funds are not involved.

4) Both loans may be lawfully made. See Opinion for assumption.

5) Yes.

6) Yes.

7) Yes.

OPINION

ANALYSIS

Prior to engaging in the separate discussion of each of your questions, it would be well to consider certain authorities applicable throughout, as well as the statutes giving rise to your problems.

Your questions grow out of Secs. 75-34-28 to 33 (P.S.). The sections contemplate certain dispositions of the Irrigation Works Construction Fund. This fund is derived in part from the Permanent Reservoirs for Irrigation Purposes Income Fund (hereafter referred to as the "trust fund"). Sec. 75-34-23 (P.S.) It is fundamental to understand the peculiar nature of the latter.

The lands constituting the original corpus of the trust fund originally were granted by the Act of Congress of June 21, 1898, being 30 Stat. 484. This and other funds were recognized by the Enabling Act, Sec. 10, which confirmed the grants, subjected the lands **and their income** (and hence the funds) to the trusts, and referred to the original grants to ascertain the purposes of expenditures from the funds. See also Secs. 7-1-16 and 17.

A controlling case relative to the problems at hand is **State ex rel Yeo** v. **Ulibarri,** 34 N.M. 184, 279 P. 509, wherein the Court gave a liberal construction to the purposes of the trust fund. It was held that expenditures from the trust fund could lawfully be made to investigate the feasibility of dams for the storage of water for irrigation; and further, such expenditures would be lawful in connection with explorations for natural underground reservoirs, storing or which were capable of storing water for irrigation, and to determine their location, boundaries, sources of supply, etc.

The Court reasoned that putting an existing reservoir in condition to store water, or to connect it with a water supply, would be establishing the same within the trust limitation. The same was said of exploration, either for reservoirs or dam sites.

Emphasis was placed by the Court on the importance of water for the **development of agriculture.** It held Congress had not dictated a fixed policy, but rather granted considerable elasticity so as to meet changing conditions and the advancement of scientific knowledge. In short, a narrow interpretation was decidedly rejected. We can do no less.

But this is not to say the trust fund may be expended for any purpose, however laudable, or however much my staff and I might agree with such purpose. The **Yeo** case held the trust in question binding, and that the Legislature, under the Enabling Act, was without power to divert the trust fund for other purposes.

Yet another facet of **Yeo v. Ulibarri** must be considered. There was language in the opinion stating Congress had not limited New Mexico, as trustee, to any particular scheme, and added at 34 N.M. 189:

"* * * It has not directed whether funds shall be used to construct, own, and forever operate irrigating works, **or to aid and encourage private construction and operation, or to aid and encourage organized quasi public irrigation districts.** * * *" (Emphasis ours).

But later, the Court refused to render a holding on this point. What was said, however, must be carefully considered when we later treat of Art. IX, Sec. 14, Constitution of New Mexico.

In Opinion of the Attorney General No. 3669, rendered February 12, 1923, it was pointed out the trust fund was intended for **irrigation purposes** and that consistent with the grant, ditches might be constructed to fill reservoirs, streams might be dammed, or water developed in whatever means could be done, in order to create an irrigation system.

Of interest is Opinion of the Attorney General No. 3763, rendered March 21, 1924, which on the strength of No. 3669, upheld expenditure by the State Engineer, pursuant to statute of trust funds, **for drilling water wells on private land, the landowner repaying the drilling costs.**

And in Opinion of the Attorney General, dated July 16, 1929, p. 148, it was held that the trust fund could be used in purchasing automobiles for the State Engineer. We can only assume the automobiles were intended for some use reasonably connected with irrigation.

Your first question, as orally supplemented by you, involves a proposed loan by the Commission, out of the Irrigation Works Construction Fund, to the Village of Pecos, for the purpose of constructing a municipal water supply system. No commercial irrigation is contemplated. In our opinion, such purpose would be within the meaning of Secs. 75-34-28, et seq., loans to construct projects being authorized. Further, projects are defined by Sec. 75-34-32 (P.S.) as follows:

"'Project' is defined to include and embrace all means of conserving and distributing water, including, without limiting the generality of the foregoing, reservoirs, dams, diversion canals, distributing canals, lateral ditches, pumping units, wells, mains, pipelines and waterworks systems and shall include all such works for the conservation, development, storage, distribution and utilization of water including, without limiting the generality of the foregoing projects for the purpose of irrigation, development of power watering of stock, supplying of water for public, domestic, industrial and other uses and fore fire protection."

which would clearly include municipal water supply systems.

However, this could only be done to the extent the loan from the Irrigation Works Construction Fund was not derived from the trust fund. We say this because here, no commercial irrigation is involved. True, **Yeo v. Ulibarri** was liberal in its construction; nonetheless, it recognized irrigation had to be someway involved else there would be an illegal diversion of the trust fund. In our opinion, the usual uses and results of a municipal water works system, such as combatting fires, using water for home, commercial and industrial uses, etc., can't be said to relate to irrigation. Certain amounts of a city's water supply, of course, are used by the populace to water lawns and shrubbery, but we hardly believe Congress included such use in effecting trusts for irrigation purposes. The fair tenor of the **Yeo** case clearly indicated irrigation meant irrigation used in furtherance of agriculture.

On the other hand, a loan could lawfully be made, for the purpose indicated, to the Village of Pecos from the Irrigation Works Construction Fund **if no trust funds were involved.** Whether proper segregation of moneys can be made is not for this office to say. On the latter, you doubtless may wish to consult the fiscal authorities.

If the Village of Pecos contemplated appreciable commercial irrigation supplied by its water system, we would give an affirmative answer entirely.

Turning to your second question, we think it calls for an affirmative answer. This involves the issue of whether the municipality can **lawfully borrow** the money in question. Loans are authorized by Sec. 75-34-28 (P.S.) to municipalities for the purpose in question. Sec. 75-34-32 (P.S.). While these statutes do not in express terms authorize municipal borrowing thereunder, we think any other construction would not only be unduly strict, but would be absurd. Such construction would amount to giving with one hand and taking away with the other. Nor should 75-34-33 be ignored, since it exempts loans from the Bateman Act. The latter, being a restriction on the power of municipalities to borrow, is made inoperative here.

Question No. 3, as verbally supplemented by you, involves an original loan by the State Board of Finance to the Town of Dexter. The purpose of the original loan was repair or rehabilitation of Dexter's elevated water storage tank, being part of the municipal water system. As in the first question, no commercial irrigation is involved or contemplated.

Restricting ourselves first to the matter of statutory interpretation, we find the original loan was for a **purpose** within Sec. 75-34-28, that is to say, to rehabilitate an existing project. But here, the question is whether the Commission can, in effect, make a refunding loan to the Town so the latter may discharge its obligation to the State Board of Finance. We think it can.

In the first place, Laws 1957, Ch. 80, being remedial statutes, must be liberally construed. **In re Gossett's Estate,** 46 N.M. 344, 129 P. 2d 56. It is to be borne in mind Sec. 75-34-28 authorizes loans up to 50 years. So, if the Commission itself had made the original loan on a short term basis, we believe it could itself refinance the loan, so long as the 50-year limitation was observed. We do not believe the status of the original lender is significant here, insofar as the Commission's present authority is concerned. Furthermore, the statute, to be given a liberal construction, ought to be interpreted so as to encourage its evident purposes, and we believe refinancing in an instance of this nature will have this encouraging effect. We hold in the affirmative, **but in so doing, again hold that no moneys derived from the trust fund may be used for this purpose, for the reasons set forth in the analysis of your first question.**

In regard to your fourth question, we believe loans for authorized purposes to an **artesian conservancy district** is clearly within the statute. This question, you have informed us, involves a factual situation growing out of decreasing subterranean artesian water pressure in the Pecos Valley Artesian Conservancy District. As a result, salt water encroachment is being experienced. If the loan is authorized, the District will in turn loan the proceeds to members, who can then use the money to line their irrigation ditches with concrete, or install underground pipes.

The need to conserve the artesian basin (or reservoir under **Yeo v. Ulibarri)** is great. The contemplated measures will certainly have this effect.

Whether this is the construction or rehabilitation of a project, within 75-34-28, is not of paramount importance. Probably the latter -- certainly it is one or both. And we have no hesitancy in holding a "project" under 75-34-32 is involved. Hence, insofar as the statute is concerned, the loan by the Commission is clearly authorized.

Insofar as the loan by the Commission of the trust fund moneys is concerned, we believe the loan, clearly to conserve irrigation water on the surface (and in turn, the subsurface reservoir) is clearly an authorized expenditure from the trust fund within the meaning of **Yeo v. Ulibarri** and the above cited Opinions of the Attorney General.

Turning to the second stage of this problem, that is, the district in turn loaning these moneys or loan proceeds to its members, we believe the district has statutory power, or can obtain the power. Turning to Secs. 75-13-1, et seq., we find in Sec. 1 that the purpose of the act is to provide for artesian conservancy districts to conserve water in artesian basins. At Sec. 75-13-11, the district is given the power to perform all acts expressly authorized plus all acts necessary and proper to carry out, for all intents and purposes, the objects for which the district was organized. See also Sec. 75-13-17. If

the district in question has not, in its petition for organization express or implied authority to loan funds to members for the purposes at hand (see Sec. 75-13-3), it should amend accordingly. **For purposes of this opinion, we assume the district's petition expressly or impliedly authorizes the loans in question.**

Since again. conservation of an irrigation reservoir is involved, we do not believe the Enabling Act presents any problem.

Turning to Constitution of New Mexico, Art. IX, Sec. 14, providing:

" **Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution,** shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad; provided nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons." (Emphasis ours).

Some initial problems encountered. We do not believe Art. IX, Sec. 14, applies for several reasons.

First a good faith loan or loans by the district to its members is contemplated. They must repay the district, or be liable in damages. In the case of City of **Clovis** v. **Southwestern Public Service Co.,** 49 N.M. 270, 161 P. 2d 878, Clovis sold its utility system to a private enterprise, partly for cash, and partly on terms. It was held that the debts of the City had not been increased and that it did not become surety for or guarantee the payment of anything. Reasoning that there was no element of guaranty, suretyship or pledge by the City, and that it did not become liable to pay anything on behalf of or for the utility company, the Court held Art. IX, Sec. 14, had not been violated on this ground. Further, despite the fact no interest was payable by the utility as to the "on terms" part of the consideration it was held no donation was involved since this factor presumably influenced the purchase price.

Applying this case to the instant situation, any loan by the district to its members should contain no element of pledge, guaranty, or suretyship in behalf of or for the benefit of anyone. Since sums certain will be loaned, however, interest should be charged, else the donation feature of the Constitution might arise.

In addition, while we do not so hold, we entertain some doubt that an artesian conservancy district is within the terms of the section. If so, it is by virtue of the term ". . . municipality . . ." used in a broad sense of political subdivisions. But if this is true, we cannot understand why the Constitution therein uses the terms ". . . county . . ." and ". . . school district . ."

Finally, regard must be had of the language quoted above from **Yeo v Ulibarri.** It is not a holding. However, it raises some doubt as to whether, in expending the trust fund, Art

IX, Sec 14, even applies. In itself, the latter is conditioned upon ". . . except as otherwise provided in this Constitution . . .". The Constitution includes, at Art XXI, Sec. 9, a consent by New Mexico to the Enabling Act. In turn, the latter does not according to **Yeo** v. **Ulibarri,** limit or direct New Mexico in using the trust fund **to aid and encourage private or quasi public irrigation districts.**

Enough has been said to raise grave doubts as to the loans at issue being limited by Art. IX, Sec. 14. We do not possess that abiding conviction of invalidity of statutes on constitutional grounds which would warrant a negative answer on this basis.

Consistent with our analysis under Question No. 2, we believe affirmative answers are called for to your fifth question.

Questions six and seven involve loans to irrigation districts to construct a water storage reservoir, and to rehabilitate a like reservoir together with works leading to and from the same. Assuming as we do the storage reservoirs are used in connection with irrigation, the **Yeo** case and our prior opinions clearly authorize this as a lawful use of the trust fund. In addition, Secs. 75-34-28, et seq., beyond question authorize this. We do not believe Art. IX, Sec. 14, inhibits either loan.

Regretting, as we do, having to give negative answers in part because of the Enabling Act, permit us to suggest you may desire to discuss the problem with our Congressional delegation. It might be that Congress would amend the Act.