Opinion No. 58-207

October 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

1. With or without the approval of the Governor and the Secretary of State, can the Interstate Stream Commission invest monies from the Permanent Reservoir for Irrigation Purposes Income Fund by loaning portions of said monies to a municipal corporation with interest, and the money to be used to repay funds already received by it from the State Board of Finance and expended in the rehabilitation of an existing "project" as defined in Laws 1957, Ch. 80?

2. Can the Commission invest monies from said fund by a loan to a municipal corporation for the purposes described in Chapter 80, Session Laws 1957, pursuant to a contract guaranteeing repayment of the loan with interest?

3. Are municipal revenue bonds ". . . safe interest-bearing securities . . ." within the meaning of Enabling Act, Section 10?

CONCLUSIONS

1. No, but see analysis.

2. See opinion.

3. No.

OPINION

ANALYSIS

Initially, we make reference to Opinion of the Attorney General No. 58-169, August 14, 1958, concerning certain authority, and limitations thereon, of the Interstate Stream Commission in loaning money of the fund in question. That opinion was concerned solely with the Commission's authority. Your latest request requires, however, that consideration be given by us to the authority, insofar as your questions are concerned, of the Governor and Secretary of State.

In the case of **State v. Marron,** 18 N.M. 426, 137 P. 845, our Court very clearly pointed out the great discretion of the Governor and Secretary of State in approving the investment of Enabling Act moneys by the State Treasurer. While the direct question in the case was the propriety of investing a portion of the Permanent School Fund in State Highway Bonds (see Constitution of New Mexico, Article XII, § 7), the case is nonetheless of great assistance. At 18 N.M. 433, our Court said:

"It is to be observed that the enabling act imposes no restrictions, in terms, as to the class of interest-bearing securities in which the funds may be invested, the only restriction in this regard being that they be 'safe.' The supervising control over the investment, conferred upon the Governor, and Secretary of State by that act, however, would seem to vest in them power to exclude any given class of securities which might, in their judgment, be deemed unsafe."

and subsequently pointed out how this discretion in approving or disapproving investment of these funds is in no way limited, but is absolute. The Court said it knew of no authority, legislative or judicial, which controlled this discretion.

It follows that the loan in question, if to be made as an investment by the Treasurer from funds derived from the Permanent Reservoirs for Irrigation Purposes Income Fund, must first be approved by the Governor and Secretary of State, those officers finding it, in their broad discretion, to be an investment in ". . . . safe interest-bearing securities . . ." We should point out, however, that unlike Article XII, § 7, § 10 of the Enabling Act, with which we are here concerned, does not vest any discretion in the Attorney General. Consequently, and perhaps at the risk of anticipating questions, it would not be for us to say what is "safe" and what is not, at least so long as the proposed investments were to be in a permissible class of securities.

The clear reasoning of the **Marron** case is that **investment** of Enabling Act funds is by the State Treasurer, subject to a "veto" power by the Governor and Secretary of State. Further, the Legislature could not authorize any one else, including the Interstate Stream Commission, to exercise this investment authority. To the extent Laws 1957, Chapter 80, may conflict with this, the legislation is unconstitutional. You could, of course, express your wishes to those officials. But the investment power is theirs; the Commission does not share in its exercise. This in no way conflicts with our earlier holding that trust funds may be loaned by the Commission **for irrigation purposes.**

We would here insert a word of caution, namely, that the Treasurer can invest only that part of the Income Fund which is not currently needed to carry out the lawful trust purposes, and before investments of the Income Funds are made the Treasurer should determine that such moneys will not be needed for the period of the proposed investment.

As to your second question, we believe what has been said above and in 58-169 disposes of the matter, but if not, please advise.

Are municipal revenue bonds ". . . safe interest-bearing securities . . ." within the meaning of Enabling Act, Section 10?

Careful research by us does not reveal any case interpreting this provision of our Enabling Act, which can be said to be a **holding** either pro or con on your question.

Investments of any of the trust funds contemplated by the Enabling Act must be, according to § 10 thereof, in ". . . safe interest-bearing securities . . ."; thus the issue as to whether municipal revenue bonds fall within the category. We do not believe so.

There is language, albeit perhaps dicta, in **State v. Marron,** supra, which we feel compels this conclusion by us. At pages 437-438 our Court had this to say:

"The Attorney General argues that the words 'other interestbearing securities' are to be construed ejusdem generis with the class of securities specifically mentioned in the section of the Constitution, and that, therefore, bank deposits are prohibited as a form of investment of these funds.

The argument has great force. Taking into consideration the character of the fund provided by the Federal government for the education of the youth of the State, its permanency and ever-increasing volume, the evident care with which the **donor has safeguarded the same by the terms of its grant,** and the character of the investments enumerated in the Constitution, there is presented to the mind, at once, the question whether it was not the intent of **both congress and the constitutional convention, by the use of the word 'securities,' to limit the investment of these funds to some form of obligation for the payment of which the taxing power is available."** (Emphasis ours)

Nor do we believe this reasoning by the Court was founded solely on the Constitution (specifically, Art. XII, § 7), but was based as well on § 10 of the Enabling Act. The reference by the Court to the ". . . donor . . ." and to ". . . the terms of **its grant . . ."** (Emphasis ours) can mean only the Enabling Act.

And it may well be, although we do not so hold as yet, that the terms ". . . safe interest-bearing securities . . ." mean those bonds or securities enumerated in Article XII, § 7, for at 18 N.M. 446, Mr. Chief Justice Roberts, concurring, said:

"The securities in which the Treasurer is authorized to invest the funds are specified in the Constitution. In the named, or authorized, securities only can he propose investments."

At any rate, municipal revenue bonds are not obligations ". . . for the payment of which the taxing power is available." Note also how the plural form was used, indicating the Court had more than one **fund** in mind.

The language quoted from the **Marron** case leaves some degree of doubt, to be sure. However, it also serves to give us pause and, indeed, requires this holding. Generally, we take a somewhat conservative view when dealing with matters of public finance, and there is all the more reason for doing so when questions concerning Enabling Act funds are involved. Duty compels this, although we do so regretfully, being fully cognizant that municipal corporations have great need for every possible avenue of financing.

Municipal revenue bonds are not a permissible class of investment under § 10 of the Enabling Act, and we so hold.

It goes without saying that nothing in this opinion nor in 58-169 authorizes borrowing by cities, towns or villages except in accordance with the provisions authorized by law.