

## **Opinion No. 87-27**

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**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Lyn Hebert, Assistant Attorney General

**TO:** Tom Thornhill, Secretary, General Services Department, John Simms Building, 715 Alta Vista, Santa Fe, New Mexico 87503

### **QUESTIONS**

What state buildings may be the beneficiaries of the Capitol Buildings Repair Fund?

### **CONCLUSIONS**

The primary beneficiaries of the Capitol Building Repair Fund ("CBRF"), Section 15-3-2 NMSA 1978, are executive, legislative, and judicial buildings located within Santa Fe, New Mexico, the state capital. In the event, however, that any capital outlay project for legislative, executive, or judicial buildings, wherever located, exceeds the authorized project cost by no more than five percent, the State Board of Finance may authorize the Property Control Division of the General Services Department to supplement the authorized cost by an allocation not to exceed five percent of the authorized cost from the CBRF to the extent of the fund's unencumbered and unexpended balance. No CBRF monies may be used, however, for the public entities that specifically have been apportioned trust land under Section 7 of the Enabling Act.

### **ANALYSIS**

This state and its people adopted the Enabling Act in Article XXI, section 9 of the New Mexico Constitution. The Enabling Act became as much a part of New Mexico fundamental law as if it had been incorporated directly into the New Mexico Constitution. *State ex rel. Interstate Stream Commission v. Reynolds*, 71 N.M. 389, 378 P.2d 622 (1963). Section 7 of the Enabling Act provides a grant of land to New Mexico "for legislative, executive and judicial public buildings heretofore erected in said territory or to be hereafter erected in the proposed state, and for the payment of the bonds heretofore or hereafter issued therefore, one hundred thousand acres...." While the Enabling Act restricts the use of income and proceeds from those lands to legislative, executive, and judicial public buildings erected within the state, it does not designate how the funds are allocated among those buildings.

The Enabling Act also is silent about who has the authority to determine which public buildings located within the state shall receive the proceeds or income from trust lands designated for legislative, executive, or judicial purposes. There is nothing in the Enabling Act restricting legislative authority to do so, however, as long as funds

generated by trust lands are used exclusively for the purpose for which they were granted. N.M. Const. art. XXI § 9; art. XIV §§ 1, 2. We thus conclude that the legislature can determine the beneficiaries of that grant as long as the proceeds benefit "the purposes for which the lands were granted ... exclusive of any other purposes." *Ervien v. United States*, 251 U.S. 41, 47 (1919). Moreover, that the Enabling Act requires income and proceeds from the sale of trust land be distributed to legislative, executive, and judicial buildings within the "state" does not lead us to conclude that the legislature may not determine which legislative, executive, or judicial buildings should be the prime beneficiaries of those funds. We believe the New Mexico state legislature has made a constitutional designation by adopting Sections 19-1-17, 15-3-24 NMSA 1978.

Section 19-1-17 NMSA, originally enacted in 1917, creates the specific funds for the proceeds from the lands granted to the state in the Enabling Act. Among the designated funds are the permanent fund and income fund for "public buildings at capital." Article XXI, section 6 of the New Mexico Constitution provides that "the capital of the state shall... be at the city of Santa Fe....," reflecting the legislative determination that the funds from the lands set aside for legislative, executive, and judicial public buildings shall be used for buildings located at the state capital.

In 1966 the legislature gave the state investment officer responsibility for the "public buildings at capital, permanent fund," continuing the designation of this particular fund to the public buildings in Santa Fe. Laws of 1966, ch. 4. We conclude that this determination continued in 1972 when the legislature created the capitol buildings repair fund by enacting Section 15-3-24 NMSA 1978, which provides:

- a. The "capitol buildings repair fund" is created. To this fund shall be transferred all income, including earnings on investments, derived from lands granted to the state by the United States congress for legislative, executive and judicial public buildings.
- b. The capitol buildings repair fund may be used to repair, remodel and equip capitol buildings and adjacent lands, to repair or replace building machinery and building equipment located in capitol buildings....
- c. In the event any capital outlay project exceeds authorized project cost by no more than five percent, the state board of finance may authorize the property control division to supplement the authorized cost by an allocation not to exceed five percent of the authorized cost from the capitol buildings repair fund to the extent of the unencumbered and unexpended balance of the fund.

Although the legislature has used the term "capitol" in Section 15-3-24, which would indicate that the fund is primarily for the use of the state capitol building itself, i.e. the building where the legislature meets, a review of legislative activity concerning public buildings in Santa Fe, including the capitol building, reveals a pattern of the use of the word "capitol" to encompass buildings other than the actual capitol building itself. For example, in 1945 the legislature created the Capitol Buildings Improvement Commission to provide for the construction of a new "capitol" and the remodeling of the

old "capitol." The Commission was given the authority to erect additional buildings on the existing capitol grounds or on grounds adjacent to the capitol. All of the buildings covered by this act collectively were referred to as "capitol buildings." See Laws of 1945, Chapter 53.

In 1963 the legislature passed the State Capitol Expansion Act, Laws of 1963, Chapter 290, which referred to "existing buildings in the capitol complex," "present capitol buildings," and "existing capitol buildings." This act provided that all income in the "public buildings at the capitol income fund" derived from lands that the United States Congress granted the state for legislative, executive, and judicial public buildings be deposited in the severance tax bond fund to the use of purposes expressed in the State Capitol Expansion Act. In 1965 the legislature used the term "capitol facilities, including the executive mansion...." See Laws of 1965, Chapter 49.

The legislature's use of the word "capitol" to include more than the building that houses the legislature continued in 1971 with the creation of the State Capitol Improvement Fund. See Laws of 1971, Chapter 64. That act referred to "capitol buildings and grounds, including the executive mansion" and provided for the acquisition of lands for "additional capitol buildings and grounds adjacent to the present capitol complex." Another indication of the legislature's use of the word "capitol" appears in Section 15-3-17 NMSA 1978: "A comprehensive and systematic development of such portion of said river and its banks as a park system, are hereby declared to be proper objects of state encouragement and support, as tending to improve the capital city of the state and the capitol buildings and grounds." It appears, therefore, that the use of the term "capitol buildings" in Section 15-3-24 NMSA 1978 includes executive, legislative, and judicial public buildings at the capital, in addition to the state capitol building itself.

It also appears, however, that the legislature excluded public buildings outside of Santa Fe. Although the legislature used the term "capitol buildings" instead of "capital buildings" in Section 15-3-24(A), (B), all such references in other provisions of law, including Section 19-1-17 NMSA 1978, include only those buildings located within Santa Fe. It thus appears that the legislature intended that CBRF's primary beneficiaries would be legislative, executive, and judicial buildings located at the state capital.

Subsection 15-3-24 C requires a different analysis. By that subsection, the legislature has drawn a distinction between "capitol buildings" in subsections (A) and (B), and all other "capital outlay projects" over which the Property Control Division has authority. The Property Control Division of the General Services Department has authority over all state buildings and lands, with several stated exceptions. The Property Control Division, with State Board of Finance authorization, may allocate not more than five percent of the authorized cost to any capital outlay project from the CBRF. This provision on its face would apply to any legislative, executive, or judicial building whether or not located within the city of Santa Fe.

The final issue is whether CBRF monies, regardless of which subsection of Section 15-3-24 is invoked, may be used for institutions that specifically have been apportioned

trust land under section 7 of the Enabling Act. This Office advised the State Board of Finance by letter dated October 26, 1983, to Mike Trujillo, then director of the Property Control Division of the General Services Department, that "capitol buildings" as used in Section 15-3-24 NMSA 1978 does not include those public entities that specifically have been apportioned trust land under Section 7 of the Enabling Act. This conclusion was premised on the fact that the CBRF contains income from one hundred thousand acres designated for legislative, executive, and judicial public buildings, and not any income from the other acreage designated to the various public entities listed under section 7 of the Enabling Act, i.e., universities; asylums; penitentiaries; schools for the deaf, dumb and blind; miners' hospital; normal schools; state charitable, penal, and reformatory institutions; agricultural and mechanical colleges; school of mines; military institutes; and the payment of bonds issued by Grants and Santa Fe counties. We continue to agree with the conclusion.

Article XIV, section 1 of the Constitution specifically confirms seven institutions as state institutions: the penitentiary at Santa Fe, the Miners' Hospital at Raton, the New Mexico State Hospital in Las Vegas, the New Mexico Boys' School at Springer, the Girls' Welfare Home at Albuquerque, the Carrie Tingley Crippled Children's Hospital, and the Los Lunas Mental Hospital at Los Lunas. N.M. Const. art. XIV, § 1. The purpose of section 1 of article XIV is to identify the institutions entitled to benefit from lands granted for "charitable, penal and reformatory" purposes. These seven institutions share equally in the funds that are designated for "charitable, penal and reformatory" institutions in the Enabling Act and Section 19-1-17 NMSA 1978.

Originally, only four institutions, i.e., the penitentiary, the Miners Hospital, the insane asylum, and the reform school, were named in Section 1. By amendment to this section in 1960 the Carrie Tingley Crippled Children's Hospital, the Girls' Welfare Home, and the Los Lunas Mental Hospital were added as beneficiaries of the land grants. It also should be noted that four of the seven institutions have a specific grant of trust lands in addition to the one-seventh interest under the "charitable, penal and reformatory" provision.

There is, however, no comparable constitutional provision setting forth the specific beneficiaries of the phrase "legislature, executive, and judicial buildings." In enacting statutes, the New Mexico legislature is presumed to be reasonable and well-informed of the existing law of the State. Statutes therefore are to be interpreted in accordance with existing law and with common sense. *Sandoval v. Rodriguez*, 420 P.2d 308, 77 N.M. 160 (1966). Section 15-3-24(A) does not include income from the other public entities' acreage specifically set forth in Section 19-1-17 NMSA 1978, in article XIV, section 1 of the Constitution, or in section 7 of the Enabling Act. It would seem then that the legislature, in accordance with Section 7 of the Enabling Act, did not intend that any CBRF money be used for the seven institutions in section 19-1-17 or otherwise receiving specific grants under section 7 of the Enabling Act.

Indeed, to permit CBRF funds to be used for any of these recipients could violate Section 7 of the Enabling Act. The United States Congress expressly granted a certain

amount of acreage to the public entities listed in Section 7. The income from the one hundred thousand acres designated for legislative, executive, and judicial public buildings goes to the Capitol Buildings Repair Fund pursuant to Section 15-3-24(A). Therefore, should any of the other trust land income recipients be permitted to use CBRF funds, they would be receiving income from trust lands that are in addition to the acreage expressly designated to them by the United States Congress under Section 7 to the diminution of the fund set aside for legislature, executive, and judicial buildings. The fact that for administrative convenience an executive agency now holds title for the state to some of the institutions named in section 7 of the Enabling Act cannot transform these institutions into legislative, executive, or judicial public buildings. The state's attempt to pool the various specific grants established by the Enabling Act resulting in the obliteration of the distinct purposes of these grants has been deemed a breach of trust. *Ervien*, 251 U.S. at 47.

Section 10 of the Enabling Act provides that the lands granted and transferred by the act "shall be by the said state held in trust, to be disposed of in whole or in part only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions." In construing the Enabling Act, the Supreme Court of the United States, citing restrictions imposed on the use of trust lands, has narrowly interpreted the Act's terms. See, e.g., *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302, 303 (1976); *Lassen v. Arizona Highway Department*, 385 U.S. 458, 468 (1967). Because of previous abuses by the states of federal land granted in trust, the Court has observed that it was Congress' intent in 1910 "to preclude any license of construction or liberties or inference" when construing the Enabling Act. *Ervien* 251 U.S. at 47. The Supreme Court in *Ervien* approved the language of the United States Court of Appeals for the Tenth Circuit's opinion, in which it reversed the judgment of the United States District Court of New Mexico:

We think it is clear that the contemplated use of the funds would be a breach of trust. Words more clearly designed than those of the act of Congress to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen. Each quantity of land with its proceeds was to be devoted to a particular object to the exclusion of all others. The act required 'separate funds,' and provided that:

No moneys shall ever be taken from one fund for deposit in any other or for any object other than that for which the land producing the same was granted or confirmed.

*United States v. Ervien*, 246 F. 277, 279 (8th Cir. 1917).

This Office considered the question of commingling the funds of the various specific grants under section 7 of the Enabling Act in 1957. The Commissioner of Public Lands asked whether the state treasurer could take the action needed to credit the permanent fund of the common schools for funds previously credited in error to the permanent fund of Eastern New Mexico University. Attorney General Opinion No. 57-314 authorized the correction, stating:

It is clear that lands granted to the State of New Mexico by the United States are held by the state in trust for the purposes of the grant and no other purposes. No proposition of law is better settled than this, that the diversion of land grant trust moneys to any other purpose, however salutary, is unconstitutional.

For these reasons, it is our opinion that the CBRF funds cannot be used to benefit other institutions that received specific grants of land under Section 7 of the Enabling Act.

**ATTORNEY GENERAL**

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