

## **Opinion No. 91-01**

February 15, 1991

**OPINION OF:** TOM UDALL, Attorney General

**BY:** Linda M. Matteucci, Assistant Attorney General

**TO:** Jeff States, Director, State Board of Finance, 203 Bataan Memorial Building, Santa Fe, New Mexico 87503

### **QUESTIONS**

Whether the legislature can reappropriate the balance of unexpended severance tax bond proceeds for purposes other than the purpose specified in the legislation originally authorizing the issuance and sale of the bonds?

### **FACTS**

In 1987, the legislature authorized the sale of severance tax bonds and appropriated a portion of the proceeds to construct, equip and furnish the industry unit at the central New Mexico correctional facility and to construct, remodel, repair, equip and furnish the central New Mexico correctional facility to accommodate double-celling and make other related improvements. In 1988, the legislature reappropriated the remainder of the 1987 bond proceeds from these two specific projects for the planning, design and purchase of equipment and materials to repair and replace water lines at the penitentiary of New Mexico.

### **CONCLUSIONS**

Yes, but only if the proceeds have not reverted to the severance tax bond fund and if it is determined by bond counsel that the bondholders are not adversely affected by the reappropriation.

### **ANALYSIS**

1. Background: The Severance Tax Bond Legislation and Resolution.

The issue presented here arises from the following legislation enacted in 1987 authorizing issuance of severance tax bonds and appropriating for certain projects the proceeds from the sale of those bonds:

**SECTION 1. SEVERANCE TAX BONDS -- PURPOSES FOR WHICH ISSUED --  
APPROPRIATION OF PROCEEDS.-**

A. The state board of finance may issue and sell severance tax bonds in compliance with the Severance Tax Bonding Act in an amount not to exceed the total of the amounts authorized for the purposes specified in this section.... Proceeds from the sale of bonds are appropriated for the purposes specified in this section.

...

C. Upon certification of the corrections department, the following amounts are appropriated to the corrections department for the following purposes:

(1) three million one hundred seventy-five thousand dollars (\$3,175,000) to construct, remodel, repair, equip and furnish the central New Mexico correctional facility to accommodate double-celling and to make other related improvements;

...

(3) one million five hundred seventy-eight thousand two hundred dollars (\$1,578,200) to construct, equip and furnish the industry unit of the central New Mexico correctional facility....

1987 N.M. Laws, ch. 354, § 1 ("1987 Legislation").

The Bond Resolution authorizing the issuance and delivery of the severance tax bonds for these projects was approved and adopted by the State Board of Finance ("Board") on September 15, 1987.

In 1988, after the bonds were sold, the legislature reappropriated the use of certain remaining unexpended bond proceeds in the following legislation ("1988 Legislation"):

A. The balance of the proceeds from the sale of severance tax bonds issued pursuant to Paragraphs (1) and (3) of Subsection C of Section 1 of Chapter 354 of Laws 1987 are appropriated to the following agencies in the following amounts for the following purposes:

...

(2) to the corrections department:

...

(b) two hundred thirty-seven thousand eight hundred dollars (\$237,800) to plan, design and purchase equipment and materials to repair and replace water lines at the penitentiary of New Mexico....

1988 N.M. Laws, ch. 3, § 3 (Second Spec. Sess.)

## 2. Constitutional Issues.

Article IX of the New Mexico Constitution addresses public debt. Article IX, § 8 limits state indebtedness and establishes procedures, including voter approval, for issuance of debt, and Article IX, § 9 limits the use of debt proceeds to the purpose for which the loan was obtained or to repay the debt. However, these sections do not apply to severance tax bonds.

The New Mexico Supreme Court in *State ex rel. Capitol Addition Building Commission v. Connelly*, 39 N.M. 312, 46 P.2d 1097 (1935), concluded that Article IX, § 8 is not applicable to bonds which do not require or warrant resorting to the general taxing power of the state for their retirement because they do not create a debt within the constitutional provision or limitation. See also, *State v. Regents of University of New Mexico*, 32 N.M. 428, 258 P. 571 (1927); *State Office Building Commission v. Trujillo*, 46 N.M. 29, 120 P.2d 434 (1942); *In re Request for Advisory Opinion on Constitutionality of 1986 PA281*, 422 N.W.2d 186 (Mich. 1988); *Schureman v. State Highway Commission*, 141 N.W.2d 62 (Mich. 1966); *Wilmington Medical Center v. Bradford*, 382 A.2d 1338 (Dela. 1978). The same interpretation applies to the limitation on the use of borrowed funds set forth in Article IX, § 9. See *State ex rel. Board of County Commissioners of Bernalillo County v. Montoya*, 91 N.M. 421, 575 P.2d 605 (1978).

Severance tax bonds authorized by the legislature are not the kind of debt contemplated by Article IX, §§ 8 and 9 because they are not dependent on the general taxing power of the state for their retirement. They are payable exclusively from a special fund created by the Severance Tax Bonding Act, NMSA 1978, Sections 7-27-1 through 7-27-48 (Repl. Pamp. 1990) ("Act"). The Act establishes a fund called the severance tax bonding fund. Section 7-27-2 states:

There is created the "severance tax bonding fund" into which shall be distributed... the net receipts from taxes levied upon natural resource products severed and saved from the soil in accordance with the provisions of the Severance Tax Act... and Oil and Gas Severance Tax Act....

After first pledging the money in this fund for payment of principal and interest on all bonds issued and outstanding at the time of the enactment of the Act, the legislation in § 7-27-6 states:

The money in the severance tax bonding fund is further pledged for the payment of principal and interest on all severance tax bonds issued after the enactment of this...Act.

Thus, retirement of severance tax bonds does not depend on the general taxing authority of the state, and severance tax bonds are not subject to the constitutional restrictions that apply to general obligation bonds.

The Bond Resolution pertaining to the bonds at issue here, approved and adopted by the State Board of Finance (the agency designated by the Act as the authority for issuing and selling severance tax bonds), is also consistent with the view that severance tax bonds are not general obligations of the state. Section 9 of the Bond Resolution states:

c. Special obligations. The bonds and the interest accruing thereon shall be payable and collectible **solely from amounts on deposit in the Severance Tax Bonding Fund** as set forth in the Act, which fund is pledged for such payment.... The registered owners of Bonds may not look to any general or other fund of the State for the payment the principal of, premium, if any, or interest on such Bonds except amounts on deposit in the Severance Tax Bonding Fund. The Bonds **shall not constitute an indebtedness nor a debt within** the meaning of any constitutional or statutory provision or limitation, **nor shall the Bonds be considered or held to be general obligations of the State.**

(Emphasis added).

Therefore, the New Mexico Constitution does not restrict the legislature's authority to reappropriate severance tax bond proceeds to another project after the bonds have been sold.

### 3. Statutory Limitations.

Section 7 of the 1987 Legislation states:

Unless otherwise specified, any unexpended or unencumbered balance remaining from the proceeds of severance tax bonds issued pursuant to Section 1 of this act shall revert to the severance tax bonding fund **six months** after completion of the project.

(Emphasis added).

The severance tax bonding fund is limited to payment of principal and interest on all past and future severance tax bonds issued and outstanding. See §§ 7-27-2 and 7-27-6. Further, any money in the severance tax bonding fund not expended for these purposes is transferred to the severance tax permanent fund pursuant to § 7-27-8. The severance tax permanent fund is restricted under Article VIII, § 10 of the New Mexico Constitution to investments not relevant here.

Thus, if the projects described in the 1987 Legislation were completed more than six months before the effective date of the 1988 Legislation reappropriating the use of the proceeds then the proceeds are not available for the reappropriated projects. The effective date of the 1988 Legislation enacted during the second special session is March 10, 1988. Therefore, it must be determined by the Board whether the date of the 1988 Legislation was within six months after the completion of the projects authorized by the 1987 Legislation. If not, the balance of the proceeds has reverted and is not available for any other purpose.

#### 4. The Bond Resolution.

The Bond Resolution approved and adopted by the Board includes the following language:

##### Section 2. Findings and Declarations.

...

C. The Legislation authorizes the Board to issue the Bonds to finance **the Projects** in the amounts set forth in Exhibit A to the Bond Resolution.

...

Section 3. The Bonds. To provide funds **for the Projects**, the Bonds shall be issued by the Board, on behalf of the State, pursuant to the Act and the Legislation....

...

D. Use of Bond Proceeds. Pursuant to the Legislation, the Board has received resolutions and certifications from the departments and agencies stated in Exhibit A... of the need for the issuance of... bonds to fund **the Projects**.... The Board declares that the issuance of the Bonds... is necessary to fund **the Projects**....

...

Section 13. Disposition of Bond Proceeds.... [T]he Legislation appropriates proceeds from the sale of...[b]onds **for the Projects**....

(Emphasis added).

These provisions appear to limit the use of the bond proceeds to the projects specified in the appropriation made by the 1987 Legislation. However, Section 21 of the Bond Resolution permits the Bond Resolution to be amended without the consent of or notice to the bondholders if the purpose is:

B. to make any change that, in the judgment of the Board, in reliance upon an opinion of counsel, does not have a material adverse effect on the rights of the owners of any Bonds.

Therefore, it is necessary for the Board's bond counsel to determine whether the reappropriation of the proceeds adversely affects the rights of the bondholders. If there is no material adverse effect to the bondholders, the Bond Resolution should be amended to properly reflect the legislation reappropriating the bond proceeds for the new expenditures.

## ATTORNEY GENERAL

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