

## Opinion No. 15-1624

August 20, 1915

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Messrs. Otis & Company, 215 Cuyahoga Building, Cleveland, Ohio.

**Legality of issue, and validity of sale of state highway bonds.**

### OPINION

{\*196} Yesterday afternoon Mr. Arthur Seligman told me that you desired some confirmation of my rather briefly expressed opinion, sent by telegraph, as to the legality of the issue, and validity of the sale, of our state highway bonds. As I have heretofore written you in substance, I cannot see the propriety of your taking my opinion on this subject when you have employed attorneys for the purpose of examining it and giving you their opinion. In view, however, of the fact that those attorneys appear to be in a very unreasonable state of mind, and of the further fact that this is a matter of great public interest to the state, I will, as briefly as possible, state to you the reasons for my conclusion. This is not a complex or difficult matter, and I am unable to understand why any difficulty should have been raised about it.

Under Section 8 of Article IX of the Constitution of the State of New Mexico no such debt as the one now under consideration can be contracted until the law authorizing it shall have been submitted to the qualified electors of the state and shall have received a majority of all the votes cast thereon at a general election, such law to be published in full in at least one newspaper in each county of the state, if one be published therein, once every week for four successive weeks next preceding the election. That section further provides that no debt should be so created if the total indebtedness of the state, exclusive of the debts of the territory and of the several counties thereof, assumed by the state, would thereby be made to exceed one per centum of the assessed valuation of all property subject to taxation in the state, as shown by the preceding general assessment.

The state legislature, at its first session, passed an act providing for the issuance of these bonds which was approved June 10, 1912, which act was submitted to the people of the state for their {\*197} ratification at the general election held in November, 1912. The Secretary of State has certified that, in accordance with the requirement of Section 9 of that act, and in pursuance of the requirement of the constitution, causing the act, he had said act published once a week in some newspaper in every county in the state for four successive weeks next preceding the general election, which was held in November, 1912, with the exception of one county in which no newspaper was published in that year prior to the election.

It further appears from the record in the office of the Secretary of State, made by the Governor, Chief Justice and Secretary as members of the state canvassing board, that there were 26,405 votes cast in favor of the State highway bond issue, and 16,821 votes cast against it. The canvass of the votes was completed on December 2, 1912, and thereafter on December 14, 1912, the Governor issued a proclamation of the result of the canvass of the votes, in accordance with the requirements of section 8 of the act authorizing the issuance of the bonds.

By Section 4 of that act the State Treasurer was directed to sell the bonds in such parcels and numbers as the Governor should direct, to the highest bidder for cash, which direction was to be issued upon a resolution duly adopted and passed by a majority vote of the State Highway Commission. That section also provided that the Treasurer should not accept any bid for less than the par value of the bonds, plus the interest accrued thereon between the date of sale and the last preceding interest maturity date. On April 25, 1915, the Governor of the State of New Mexico issued a direction to the State Treasurer to sell five hundred of these bonds or so much thereof as might be required to raise the amount of \$ 500,000.00, and recited in that direction that it was given in pursuance of a request made by resolution adopted and passed by a majority vote of the State Highway Commission as provided in said Section 4 of said act.

The same section of the act required the State Treasurer to publish notices of the time and place of the sale in newspapers published in Santa Fe, New Mexico, Albuquerque, New Mexico, New York, Chicago and Kansas City once a week for four successive weeks next preceding the date fixed for such sale. In accordance with this requirement the State Treasurer did so advertise the sale for four weeks, but I am informed that in one or more of the newspapers there was an interval of more than a week between the last advertisement and the time fixed for the sale. I do not attach any importance to this, as there is no doubt that the sale was thoroughly advertised, and the fact that a bid was secured at par and accrued interest, in the present condition of the bond market, is evidence that no injury could possibly have resulted from the slight deviation from the exact requirement contained in the language of said Section 4 on this subject. No court would hold against the validity of bonds upon any such ground as this when they had been sufficiently advertised to produce a sale in accordance with the terms of the law.

As to the constitutional limitation as to the amount of indebtedness, {*\*198*} that is met by the statement, as shown by the records of the offices of the State Treasurer and State Auditor and the certificate of the State Auditor that the total indebtedness of the state, exclusive of the debts of the territory and the several counties thereof assumed by the state, is \$ 948,000.00, when taken together with the certificate of the Traveling Auditor, in whose office were the records showing the assessed valuation of all property subject to taxation in the state, that such assessed valuation for the year 1913 was the sum of \$ 252,259,555.00, the bonds being dated July 1, 1913.

I cannot find that there is any constitutional or statutory requirement with which there has not been full compliance. I have no copy of the bonds as issued to which to refer,

but I have no doubt that each bond recites that there has been such full and complete compliance with all legal requirements. With this slight reservation, as to which you can readily satisfy yourself by reference to the bonds, I have no hesitation in saying quite positively that this issue of bonds is fully authorized, and that their sale is entirely valid.

There are three things as to which some question appears to have been raised by the attorneys who were to pass upon the validity of the bonds for you, of which I should make at least some mention. I have not seen all of the correspondence from those persons, but I have seen enough to know that they raised some question about a mandamus case in the Supreme Court of the state brought by the State Highway Commission against the State Auditor to require him to draw a warrant for all of the money then in the state road fund, something over \$ 17,000.00; also as to an injunction suit brought by John Clark, of Las Vegas, against the County Road Board of San Miguel County to restrain that board from using any of the money under its control to assist in making the purchase of the state highway bonds; and also on inquiry as to whether there was any agreement or arrangement by which anyone was to contribute money to complete the purchase.

Why any such demands were made for this information is quite impossible to understand. The mandamus case against the State Auditor had no relation whatever to the issuance or sale of the state highway bonds. It was brought for the purpose of obtaining a judgment of the highest court of the state as to the extent of the control of the state highway commission over the money in the state road fund. The attention of the court was called to the fact that this might have some effect upon the control of the proceeds of the sale of the bonds, amounting to \$ 500,000.00, when received and placed in the state road fund, and I believe that the conclusion reached by the court will be controlling on that point. But, as you will readily see, it was not directly involved in that case, and even if it had been that would have been a question as to how the state officers should deal with the proceeds of this sale, which is a matter that would arise only after the sale had been completed and the money paid. There is no possible way that it could have any effect upon the legality of the issue, or the validity of the sale of the bonds. The court held that the state road fund was absolutely and entirely under the control of the State Highway {\*199} Commission, although that is of no importance in the present examination, as I have already stated.

As to the injunction case of Clark against the County Road Board, that is equally aside from any possible question about the issuance or sale of the bonds. The proposition was to use a part of the county road money, under the control of the county road board, to assist the purchasers of the bonds in making up the sum necessary to pay for them so that the purchasers would not suffer an absolute loss, and the court held, as I am informed, and I have no doubt of the correctness of the conclusion, that the County Road Board had no right make any use of the county road money for any purpose except directly upon the county roads, or work directly connected therewith.

As to the inquiry about anyone coming to the assistance of the purchasers by way of contributions so as to enable them to complete the payment for the bonds, I can only

say that it is not the business of anyone where the money comes from with which the bonds are purchased so long as the state gets the full amount of the price bid. I am informed, as a matter of fact, that by individual contributions, and by payments from the proper county authorities cut of the general county funds, as to the legality and propriety of which no one has attempted to make any question, money has been raised so that this sale is sure to go through. The state will get all of its money, and will have it available for use on the roads as it may be required from time to time by the State Highway Commission which is charged with the duty of expending that money.