

Opinion No. [29-65]

May 3, 1929

TO: Office of the Attorney General of New Mexico

PUBLIC MONIES -- Trust Funds.

OPINION

I have before me your letter of April 11, 1929, which accompanies a letter of the 29th ultimo from N. B. Phillips, Cashier of Elephant Butte Irrigation District of New Mexico, Las Cruces, New Mexico.

You ask for an opinion from this office as to whether or not it would be legal for you to set up the fund attempted to be created by chapter 57 of the Laws of 1905 to aid in establishing a permanent water reservoir for irrigating purposes at or near the Elephant Butte for the improvement of the Rio Grande in New Mexico, and the increasing of the surface flow of the water in the bed of the Rio Grande.

I shall not extend this letter to the proportions of a brief, but content myself with calling your attention to a few of the reasons which prompt me to advise that you did not set up such fund.

The appropriation made, or attempted to be made, is from any net monies at that time or afterwards found to be in the water reservoir income fund, water reservoir permanent fund, improvement Rio Grande permanent fund and improvement Rio Grande income fund, or from whatever fund or funds in which the net proceeds of the leasing and sale of lands granted to the Territory of New Mexico for the establishment of permanent water reservoirs for irrigation purposes and for the improvement of the Rio Grande in New Mexico, and the increasing of the surface flow of the water in the bed of that river, and the income therefrom shall be carried. That is, this appropriation is made from a number of funds and in such way that there can be no apportionment among the funds.

These funds are all derived from lands granted to the Territory of New Mexico by an Act of the Congress of the United States, approved June 21, 1898, and known as The Ferguson Act, and are trust funds, the uses of which are specifically limited to the purposes specified in the grant. The Act makes provision for the sale of land by the state under certain conditions and provides:

"* * * All money received on account of such sales after deducting the actual expenses necessarily incurred in connection with the execution thereof shall be placed to the credit of separate funds created for the respective purposes named in this Act and shall be used only as the legislative assembly of said territory may direct, and only for the use of the institutions or purposes for which the respective grants of land are made."

By provisions in the Enabling Act, approved June 20, 1910, and incorporated into sections 9 and 10 of article 21 of the State Constitution, which provisions I need not quote here, the lands formerly granted to the Territory were confirmed and the title established in the new state, and the conditions of the grant relative to the use of the several trust funds assented to and confirmed.

The uses attempted to be made of these trust funds by the provisions of chapter 57 of the Laws of 1905 are more extensive than indicated in the title to the chapter, and in the opinion of this office, go far beyond the uses authorized by the Act of Congress granting the lands from which the funds are derived. For this reason, if for no other, my suggestion would be that you do not set up the funds demanded by Elephant Butte Irrigation District.

In addition to the matters above referred to, it appears that this act of the territorial legislature of 1905 was not carried forward into the Codification of 1915, and possibly was by that omission repealed. Whether or not this is true, we find as section 4 of chapter 109 of the Laws of 1917, the following:

"The appropriations herein made or heretofore made by any legislature of this state, except as to unexpended portions carried forward shall cease and determine on and after December 1, 1919."

This we believe to effect a cancellation of the appropriation made by the act of 1905, if any valid appropriation was thereby made.

The legislature, by chapter 63, Laws of 1921, attempts the legislative interpretation of section 4 of chapter 109, Acts of 1917, above quoted, declaring in effect that section 4 shall not be construed or held as having in any manner or to any extent affected or repealed the appropriation attempted to be made by chapter 57, Laws of 1905. It is, however, provided in section 18, article 4 of the New Mexico Constitution, that:

"No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but each section thereof as revised, amended or extended shall be set out in full."

Even if we should consider the act of the legislature, as expressed in chapter 63, Laws of 1921, as more than a legislative construction, and as an attempt to re-enact or extend the provisions of the original act of 1905, we think such act failed to accomplish that purpose.

Unless and until by proper proceedings a different and authoritative interpretation should be placed on these acts by the Supreme Court of this state, you, in my opinion, should not set up or issue warrants against trust funds attempted to be expended under the provisions of chapter 57, Session Laws of 1905.