Enabling Act
For
New Mexico

(Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310)

Sec. 1. Constitutional convention; delegates; election; apportionment.

The qualified electors of the territory of New Mexico are hereby authorized to vote for and choose delegates to form a constitutional convention for said territory for the purpose of framing a constitution for the proposed state of New Mexico. Said convention shall consist of one hundred delegates; and the governor, chief justice and secretary of said territory shall apportion the delegates to be thus selected, as nearly as may be, equitably among the several counties thereof in accordance with the voting population, as shown by the vote cast at the election for delegate in congress in said territory in nineteen hundred and eight: provided, that in the event that any new counties shall have been added after said election, the apportionment for delegates shall be made proportionate to the vote cast within the various precincts contained in the area of such new counties so created, and the proportionate number of delegates so apportioned shall be deducted from the original counties out of which such counties shall have been created.

The governor of said territory shall, within thirty days after the approval of this act, by proclamation, in which the aforesaid apportionment of delegates to the convention shall be fully specified and announced, order an election of the delegates aforesaid on a day designated by him in said proclamation, not earlier than sixty nor later than ninety days after the approval of this act. Such election for delegates shall be held and conducted, the returns made and the certificates of persons elected to such convention issued, as nearly as may be, in the same manner as is prescribed by the laws of said territory regulating elections therein of members of the legislature existing at the time of the last election of said members of the legislature; and the provisions of said laws in all respects, including the qualifications of electors and registration, are hereby made applicable to the election herein provided for; and said convention, when so called to order and organized, shall be the sole judge of the election and qualifications of its own members. Qualifications to entitle persons to vote on the ratification or rejection of the constitution formed by said convention when said constitution shall be submitted to the people of said territory hereunder shall be the same as the qualifications to entitle persons to vote for delegates to said convention.

ANNOTATIONS

Cross references. — For consent to Enabling Act, *see* N.M. Const., art. XXI, § 9.

Compiler's notes. — The section headings throughout this Enabling Act were inserted by the compiler.

Election within purview of liquor sale prohibition. — Election of September 6, 1910, for delegates to the constitutional convention, was held in every county and precinct of the territory of New Mexico, and was as general as any November election ever will be, or ever has been, and was such an election as came within the purview of § 4138, 1897 Comp., prohibiting the sale of liquor on general election days. *Territory v. Ricordati*, 1913-NMSC-037, 18 N.M. 10, 132 P. 1139.

Sec. 2. Meeting of delegates; mandatory provisions of constitution.

The delegates to the convention thus elected shall meet in the hall of the house of representatives in the capital of the territory of New Mexico at twelve o'clock noon on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all. After organization they shall declare on behalf of the people of said proposed state that they adopt the constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed state, all in the manner and under the conditions contained in this act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the constitution of the United States and the principles of the declaration of independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state:

A. that perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited;

B. that the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed

by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe;

C. that the debts and liabilities of said territory of New Mexico and the debts of the counties thereof which shall be valid and subsisting at the time of the passage of this act shall be assumed and paid by said proposed state, and that said state shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said territory or of any of the several counties thereof at the time of the passage of this act: provided, that nothing in this act shall be construed as validating or in any manner legalizing any territorial, county, municipal or other bonds, obligations or evidences of indebtedness of said territory or the counties or municipalities thereof which now are or may be invalid or illegal at the time said proposed state is admitted, nor shall the legislature of said proposed state pass any law in any manner validating or legalizing the same;

D. that provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said state and free from sectarian control, and that said schools shall always be conducted in English;

E. that said state shall never enact any law restricting or abridging the right of suffrage on account of race, color or previous condition of servitude;

F. that the capital of said state shall, until changed by the electors voting at an election provided for by the legislature of said state for that purpose, be at the city of Santa Fe, but no election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five;

G. that there be and are reserved to the United States, with full acquiescence of the state, all rights and powers for the carrying out of the provisions by the United States of the act of congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if said state had remained a territory;

H. that whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed state shall be allotted, sold, reserved or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation or other disposal to all the laws of the United States prohibiting the

introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them;

I. that the state and its people consent to all and singular the provisions of this act concerning the lands hereby granted or confirmed to the state, the terms and conditions upon which said grants and confirmations are made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of congress. (As amended August 21, 1911, 37 Stat. 42, J.R. No. 8.)

ANNOTATIONS

Cross references. — *See* N.M. Const., art. XXI, §§ 1 to 10. For amendment of compact with United States, *see* N.M. Const., art. XIX, § 4.

Compiler's notes. — The Act of Aug. 21, 1911 deleted a requirement specifying proficiency in English as a qualification for all state officers and members of the state legislature.

Validity of conditions for statehood. — Conditions imposed by congress upon new states through their enabling acts are valid when they result from exercise of powers conferred upon federal government. *United States v. Sandoval*, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913).

Enabling Act disclaimed state jurisdiction over Indians, and the state of New Mexico has declined to assume jurisdiction over the Indian reservations within the state by failing to take affirmative steps under congressional acts. *Chino v. Chino*, 1977-NMSC-020, 90 N.M. 203, 561 P.2d 476.

Except where granted or sanctioned. — The terms upon which New Mexico was admitted as one of the states of the Union and N.M. Const., art. XXI, § 2 left no room for a claim by the state to governmental power over the Indians or Indian lands, except where such jurisdiction has been specifically granted by act of congress or sanctioned by decisions of the supreme court of the United States. *Your Food Stores, Inc. v. Village of Espanola*, 1961-NMSC-041, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

Navajo reservation is not completely separate entity existing outside of the political and governmental jurisdiction of New Mexico. The state has some jurisdiction, and there

is not and never has been "exclusive federal authority." *Montoya v. Bolack*, 1962-NMSC-073, 70 N.M. 196, 372 P.2d 387.

Pueblo Indians are under protection of United States, as dependent communities, and their lands and property are subject to congressional legislation. *United States v. Candelaria*, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023 (1926).

Liquor prohibition. — Congress is vested with plenary power to legislate as to the territories; its prohibition in Enabling Act of introduction of liquor into "Indian country" was valid. *United States v. Sandoval*, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913).

Crimes by or against Indians. — There is nothing in this act which precludes jurisdiction of the United States over crimes committed by or against Indians in their pueblos, which are Indian lands under 25 U.S.C. § 217. *United States v. Chavez*, 290 U.S. 357, 54 S. Ct. 217, 78 L. Ed. 360 (1933).

Section 465 of the federal Indian Reservation Act did not bar application of nondiscriminatory state gross receipts tax to ski resort built by tribe on land not on the reservation, but leased from the federal government, but did preclude imposition of compensating use tax on personalty installed as permanent improvements in construction of the ski lifts. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Pueblo Indians are subject to road tax for the benefit of roads outside of their own lands. 1915-16 Op. Att'y Gen. 9.

State not obligated on claim. — Subsection C did not obligate state to pay claims against county for wild animal bounties, where, under the law, no claim existed against county until county commissioners had levied and collected a tax for its payment. *State ex rel. Beach v. Board of Loan Comm'rs*, 1914-NMSC-040, 19 N.M. 266, 142 P. 152.

Bond issue unconstitutional. — Laws 1921, ch. 6, inasmuch as it permitted state board of loan commissioners to issue state bonds for purpose of reimbursing town and counties for principal and interest upon railroad aid bonds previously issued and validated by congress, was unconstitutional, for it allowed a diversion from original objects of proceeds from lands granted by congress. Act June 5, 1920 (41 Stat. 947) gives consent to such diversion, but a constitutional amendment must be enacted before the same can be effected. *Bryant v. Board of Loan Comm'rs*, 1922-NMSC-069, 28 N.M. 319, 211 P. 597.

State legislature was without power to reimburse two counties and a town for moneys paid on bonds which they had issued, because the act, in violation of the state constitution, authorized a diversion of proceeds of lands granted by Enabling Act from the objects stated in that act, after the state had accepted terms and conditions of grant by its constitution. *Bryant v. Board of Loan Comm'rs*, 1922-NMSC-069, 28 N.M. 319, 211 P. 597.

Teaching religion in public schools. — Teachers in public schools must not dress in religious garb or wear religious emblems while in discharge of their duties, must refrain from teaching sectarian religion and doctrines and dissemination of religious literature during such time and must be under actual control and supervision of responsible school authorities. *Zellers v. Huff*, 1951-NMSC-072, 55 N.M. 501, 236 P.2d 949 .

State garnishment proceeding impinges tribal sovereignty. — To permit a state court to run a garnishment against a corporation located on the Navajo Reservation, and attach wages earned by an Indian for on-reservation labor, would thwart a Navajo policy not to allow garnishment; such impinges upon tribal sovereignty, and runs counter to the letter and the spirit of the Navajo Treaty of 1868, this act and other applicable federal statutes. *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980).

Tingley Hospital to retain entitlement to funds upon relocation. — If the Carrie Tingley Crippled Children's Hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in N.M. Const., art. XIV, § 1, it would retain its entitlement to the funds derived from lands granted under this act. 1980 Op. Att'y Gen. No. 80-16.

Water rights of Pueblo Indians. — The Pueblo Indians have a right to use all the water in the Tesuque and Nambelpojoaque stream system necessary for their domestic uses and to irrigate their lands, except for the land ownership and appurtenant water rights terminated by the operation of the federal 1924 Pueblo Lands Act, Act of June 7, 1924, ch. 331, § 1 et seq. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985).

State taxation of non-Indians' activities on Indian lands permissible. — In the absence of federal legislation, state taxation of non-Indians' activities on Indian lands in generally permissible. *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), cert. denied, 450 U.S. 959, 101 S. Ct. 1417, 67 L. Ed. 2d 383 (1981), *reh'g denied*, 455 U.S. 929, 102 S. Ct. 1296, 71 L. Ed. 2d 522 (1982).

Law reviews. — For note, "State Fishing and Game Regulations Do Not Apply on Tribally Owned Reservation Land," see 23 Nat. Resources J. 487 (1983).

Sec. 3. Submission of constitution to people; canvass of returns; rejection; reassembling of convention.

When said constitution shall be formed as aforesaid the convention forming the same shall provide for the submission of said constitution to the people of New Mexico for ratification at an election which shall be held on a day named by said convention not earlier than sixty nor later than ninety days after said convention adjourns, at which election the qualified voters of New Mexico shall vote directly for or against said constitution and for or against any provisions thereof separately submitted. The returns of said election shall be made by the election officers direct to the secretary of the territory of New Mexico at Santa Fe, who, with the governor and the chief justice of said

territory, shall constitute a canvassing board, and they, or any two of them, shall meet at said city of Santa Fe on the third Monday after said election and shall canvass the same. If a majority of the legal votes cast at said election shall reject the constitution, the said canvassing board shall forthwith certify said result to the governor of said territory, together with the statement of votes cast upon the question of the ratification or rejection of said constitution and also a statement of the votes cast for or against such provisions thereof as were separately submitted to the voters at said election; whereupon the governor of said territory shall, by proclamation, order the constitutional convention to reassemble at a date not later than twenty days after the receipt by said governor of the documents showing the rejection of the constitution by the people, and thereafter a new constitution shall be framed and the same proceedings shall be taken in regard thereto in like manner as if said constitution were being originally prepared for submission and submitted to the people.

ANNOTATIONS

Presentation of proposed constitution. — Congress left the determination of whether to present the proposed constitution to the voters as a package or separately up to the 1910 constitutional convention. 1969 Op. Att'y Gen. No. 69-64.

Presentation by later conventions. — In the Enabling Act of 1910 congress did not express itself on the question of how later constitutional conventions in the state were to present their proposed changes to the voters. 1969 Op. Att'y Gen. No. 69-64.

Sec. 4. Approval of constitution by president of United States and congress; proclamation calling election for county and state officers.

When said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of New Mexico as aforesaid a certified copy of the same shall be submitted to the president of the United States and to congress for approval, together with the statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if congress and the president approve said constitution and the said separate provisions thereof, or, if the president approves the same and congress fails to disapprove the same during the next regular session thereof, then and in that event the president shall certify said facts to the governor of New Mexico, who shall, within thirty days after the receipt of said notification from the president of the United States, issue his proclamation for the election of the state and county officers, the members of the state legislature and representatives in congress, and all other officers provided for in said constitution, all as hereinafter provided; said election to take place not earlier than sixty days nor later than ninety days after said proclamation by the governor of New Mexico ordering the same.

Sec. 5. Election of state and county officers; members of house of representatives; service of territorial officers.

Said constitutional convention shall, by ordinance, provide that in case of the ratification of said constitution by the people, and in case the president of the United States and congress approve the same, or in case the president approves the same and congress fails to act in its next regular session, all as hereinbefore provided, an election shall be held at the time named in the proclamation of the governor of New Mexico, provided for in the preceding section, at which election officers for a full state government, including a governor, members of the legislature, two representatives in congress, to be elected at large from said state, and such other officers as such constitutional convention shall prescribe, shall be chosen by the people. Such election shall be held, [and] the returns thereof made, canvassed and certified to by the secretary of said territory in the same manner as in this act prescribed for the making of the returns, [and] the canvassing and certification of the same of the election for the ratification or rejection of said constitution, as hereinbefore provided, and the qualifications of voters at said election for all state officers, members of the legislature, county officers and representatives in congress and other officers prescribed by said constitution shall be made the same as the qualifications of voters at the election for the ratification or rejection of said constitution as hereinbefore provided. When said election of said state and county officers, members of the legislature and representatives in congress and other officers above provided for shall be held and the returns thereof made, canvassed and certified as hereinbefore provided, the governor of the territory of New Mexico shall certify the result of said election, as canvassed and certified as herein provided, to the president of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the president of the United States the proposed state of New Mexico shall be deemed admitted by congress into the union, by virtue of this act, on an equal footing with the other states. Until the issuance of said proclamation by the president of the United States, and until the said state is so admitted into the union and said officers are elected and qualified under the provisions of the constitution, the county and territorial officers of said territory, including the delegate in congress thereof elected at the general election in nineteen hundred and eight, shall continue to discharge the duties of their respective offices in and for said territory: provided, that no session of the territorial legislative assembly shall be held in nineteen hundred and eleven.

ANNOTATIONS

Justices of peace were precinct, not county, officers within terms of this section. *Territory ex rel. Welter v. Witt*, 1911-NMSC-040, 16 N.M. 335, 117 P. 860.

Justices of the peace were not to be elected at first state election. 1909-12 Op. Att'y Gen. 210.

Holdover officer is officer de jure. — Where provision is made by statute for an officer to hold over until his successor is duly elected and qualified, the holdover is regarded as in all respects a de jure officer, and expiration of his term does not produce a vacancy. *Territory ex rel. Klock v. Mann*, 1911-NMSC-076, 16 N.M. 744, 120 P. 313.

Officers of Curry county, appointed by the governor under statute creating that county, were entitled to hold their offices until their successors were duly elected and qualified. 1909-12 Op. Att'y Gen. 185.

Holdover provision not conflicting. — The main object of Laws 1901, ch. 6, § 6 (since repealed), relating to the appointment of cadets to the military institute, was to provide for the appointment of cadets, each two years, to a number equal to the number of members of the legislature and one more appointed by the governor, and this object was not interfered with by provision of this section continuing in office territorial officers elected in 1908, with proviso that no session of the legislative assembly should be held in 1911. 1909-12 Op. Att'y Gen. 190.

Sec. 6. School and lieu lands; lands in national forests.

In addition to sections sixteen and thirty-six, heretofore granted to the territory of New Mexico, sections two and thirty-two in every township in said proposed state not otherwise appropriated at the date of the passage of this act are hereby granted to the said state for the support of common schools; and where sections two, sixteen, thirty-two and thirty-six, or any parts thereof, are mineral, or have been sold, reserved or otherwise appropriated or reserved by or under the authority of any act of congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of Sections Twenty-Two Hundred and Seventy-Five and Twenty-Two Hundred and Seventy-Six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: provided, however, that the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such township containing six hundred and forty acres or more: and provided further, that the grants of sections two, sixteen, thirty-two and thirty-six to said state, within national forests now existing or proclaimed, shall not vest the title to said sections in said state until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the secretary of the treasury to the state, as income for its common school fund, such proportion of the gross proceeds of all the

national forests within said state as the area of lands hereby granted to said state for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of all the national forests within said state, the area of said sections when unsurveyed to be determined by the secretary of the interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the treasury not otherwise appropriated.

ANNOTATIONS

Cross references. — *See* compiler's note to Sec. 10 of the Enabling Act.

Act a present grant. — This act operates as a present grant to state of school sections, subject only to the identification by survey, when title vested. As soon as the lands are surveyed, the state acquires an interest and it may take possession and lease to private persons. *Dallas v. Swigart*, 1918-NMSC-052, 24 N.M. 1, 172 P. 416.

Survey completes passage of title. — Enabling Act, construed as a statute, evinces an intention on part of congress to pass immediate title to state to school sections, subject only to identification by survey, and when school sections were surveyed in the field, all obstacles to rights of state were removed, and no third persons could acquire any interest in the sections. *Dallas v. Swigart*, 1918-NMSC-052, 24 N.M. 1, 172 P. 416.

The language of this section: "are hereby granted to the said state for the support of common schools" created a grant in praesenti, and title to surveyed school land immediately became vested in state; title to unsurveyed land would attach at time the land was sufficiently identified by survey under provisions of statute. *United States ex rel. N.M. v. Ickes*, 72 F.2d 71 (D.C. Cir.), cert. denied, 293 U.S. 596, 55 S. Ct. 111, 79 L. Ed. 689 (1934).

Survey must be completed and approved by secretary of interior, before title of state attaches or becomes vested. *United States ex rel. N.M. v. Ickes*, 72 F.2d 71 (D.C. Cir.), cert. denied, 293 U.S. 596, 55 S. Ct. 111, 79 L. Ed. 689 (1934).

Alienation authorized. — Land commissioner has power to alienate particular public lands held in trust for public schools; but no right to such lands can be acquired by circumvention or any indirect method. *In re Dasburg*, 1941-NMSC-024, 45 N.M. 184, 113 P.2d 569.

Reservation of mineral rights. — State, through its land commissioner, properly reserved minerals and mineral rights in selling and in issuing its patent to school and asylum lands granted to it by the federal government, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. *Terry v. Midwest Ref. Co.*, 64 F.2d 428 (10th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933).

A federal statute (43 U.S.C. § 870), which requires a state to reserve "coal and other minerals" when conveying the "numbered sections" granted to the state in support of common schools, does not apply to land selected by the state in lieu of, or as indemnity for, common school land. *Roe v. State ex rel. State Hwy. Dep't*, 1985-NMSC-109, 103 N.M. 517, 710 P.2d 84, cert. denied, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986), *overruled on other grounds*, *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184.

Indemnity land. — Land officers may waive or surrender a titled tract in the reservation, and may select and take in lieu of it a tract of like area from the unappropriated nonmineral public lands outside the reservation. Acceptance of such a proposal, and compliance with its terms, confers a vested right in the selected land which they cannot lawfully cancel or disregard. *Payne v. New Mexico*, 255 U.S. 367, 41 S. Ct. 333, 65 L. Ed. 680 (1921).

Sec. 7. University and internal improvement land grants; school fund.

In lieu of the grant of land for purposes of internal improvements made to new states by the Eighth Section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swampland grant made by the Act of September twenty-eighth, eighteen hundred and fifty, and Section Twenty-Four Hundred and Seventy-Nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each senator and representative in congress, made by the Act of July second, eighteen hundred and sixty-two, Twelfth Statutes at Large, page five hundred and three, which grants are hereby declared not to extend to the said state, and in lieu of the grant of saline lands heretofore made to the territory of New Mexico for university purposes by Section Three of the Act of June twenty-first, eighteen hundred and ninety-eight, which is hereby repealed, except to the extent of such approved selections of such saline lands as may have been made by said territory prior to the passage of this act, the following grants of lands are hereby made, to wit:

for university purposes, two hundred thousand acres; 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 therefor, one hundred thousand acres; for insane asylums, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for schools and asylums for the deaf, dumb and the blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said territory shall, until further order of congress, continue to be paid to said state for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Grant and Santa Fe counties, New

Mexico, which said bonds were validated, approved and confirmed by Act of congress of January sixteenth, eighteen hundred and ninety-seven (Twenty-Ninth Statutes, page four hundred and eighty-seven), one million acres: provided, that if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues or profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said state, distributions from which shall be made in accordance with the the first paragraph of section 10 and shall be used for the maintenance of the common schools of said state. (As amended August 7, 1997, 111 Stat. 1113, Pub. L. 105-37.)

ANNOTATIONS

Cross references. — For acceptance and use of Enabling Act educational grants, *see* N.M. Const., art. XII, § 12.

The 1997 amendment, substituted "distributions from which shall be made in accordance with the first paragraph of section 10 and shall be used" for "the income therefrom only to be used" near the end of the proviso in the second paragraph.

Through Public Law 105-37, Congress consented to the 1996 amendments of N.M. Const., art. VIII, § 10 and N.M. Const., art. XII, §§ 2, 4 and 7.

Proceeds to be kept in fund. — Enabling Act requires that all moneys derived from lands granted to agricultural college (now New Mexico state university), except ordinary rentals, be kept in a permanent fund; only interest thereon can be appropriated for current use. *State v. Llewellyn*, 1917-NMSC-031, 23 N.M. 43, 167 P. 414, cert. denied, 245 U.S. 666, 38 S. Ct. 63, 62 L. Ed. 538 (1917).

Ferguson Act (30 Stat. 484) and Enabling Act are in pari materia; they must be read and construed together to determine the policy of congress. When so read, a state's compact with the United States requires proceeds of sales of university lands, and of natural products thereof, such as oil royalties, to be accumulated in a permanent fund of the university and income used only for current income. *Regents of Univ. of N.M. v. Graham*, 1928-NMSC-004, 33 N.M. 214, 264 P. 953.

Publicity expenditure invalid. — Act authorizing commissioner of public lands to expend annually three cents on the dollar of annual income from sales and leases for publicity purposes is, in its application to proceeds of trust lands, invalid. *United States v. Ervien*, 246 F. 277 (8th Cir. 1917), aff'd, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919).

Mineral reservation authorized. — State, through commissioner of public lands, properly reserved minerals and mineral rights in selling, and in issuing its patent to, school and asylum lands granted to it by the government, and patentee was not entitled

to ejectment against state's lessee of oil and gas rights. *Terry v. Midwest Ref. Co.*, 64 F.2d 428 (10th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933).

No constitutional amendment necessary for relocation of land grant beneficiary. — So long as the seven institutions named in N.M. Const., art. XIV, § 1, remain named as the land grant beneficiaries, no amendment of that section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

Tingley Hospital to retain entitlement to funds upon relocation. — If the Carrie Tingley Crippled Children's Hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in N.M. Const., art. XIV, § 1, it would retain its entitlement to the funds derived from lands granted under this act. 1980 Op. Att'y Gen. No. 80-16.

Bonds of university, when issued, are valid obligations of it, and not of state. *State v. Regents of Univ. of N.M.*, 1927-NMSC-047, 32 N.M. 428, 258 P. 571.

Girls' welfare home is not entitled to proceeds from lands set aside for state penal, charitable and reformatory institutions without further legislation. 1929-30 Op. Att'y Gen. 69.

Sec. 8. Land grant schools under control of state; aid to sectarian schools prohibited.

The schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

Sec. 9. Common school fund.

Five per centum of the proceeds of sales of public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the union, after deducting all the expenses incident to such sales, shall be paid to the said state to be used as a permanent inviolable fund, distributions from which shall be made in accordance with the first paragraph of section 10 and shall be expended for the support of the common schools within said state. (As amended August 7, 1997, 111 Stat. 1113, Pub. L. 105-37.)

ANNOTATIONS

The 1997 amendment, substituted "distributions from which shall be made in accordance with the first paragraph of section 10 and shall be expended" for "the interest of which only shall be expended" near the end of the section.

Through Public Law 105-37, Congress consented to the 1996 amendments of N.M. Const., art. VIII, § 10 and N.M. Const., art. XII, §§ 2, 4, and 7.

Sec. 10. Grants of public lands held in trust; sale or lease; price; restrictions; water power reservations; lieu sections; national forests.

It is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same. The trust funds, including all interest, dividends, other income, and appreciation in the market value of assets of the funds shall be prudently invested on a total rate of return basis. Distributions from the trust funds shall be made as provided in Article 12, Section 7 of the Constitution of the State of New Mexico.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust; provided, however, that the state of New Mexico, through proper legislation, may provide for the payment, out of the income from the lands herein granted, which land may be included in a drainage district, of such assessments as have been duly and regularly established against any such lands in properly organized drainage districts under the general drainage laws of said state.

No mortgage or other encumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner and after the notice by publication thus provided for sales and leases of the lands themselves: provided, that nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

Lands east of the line between ranges eighteen and nineteen east of the New Mexico principal meridian shall not be sold for less than five dollars [($5.00)] per acre, and lands west of said line shall not be sold for less than three dollars [($3.00)] per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars [($25.00)] per acre: provided, that said state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said state, to be selected from lands of the character named and in the manner prescribed in Section Eleven of this act.

There is hereby reserved to the United States and exempted from the operation of any and all grants made or confirmed by this act to said proposed state all land actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission and which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the president declaring the admission of the state; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said state, and any conveyance or transfer of such land by said state or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants, there [shall] be, and is hereby, granted to the proposed state an equal quantity of land to be selected from land of the character named and in the manner prescribed in Section Eleven of this act.

Every sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provision of the constitution or laws of the said state to the contrary notwithstanding.

It shall be the duty of the attorney general of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act; provided, that the secretary of

the interior is hereby authorized in his discretion to accept on behalf of the United States, title to any land within the exterior boundaries of the national forests in the state of New Mexico, title to which is in the state of New Mexico, which the said state of New Mexico is willing to convey to the United States, and which shall be so conveyed by deed duly recorded and executed by the governor of said state and the state land commissioner, with the approval of the state land board of said state, and as to land granted to the said state of New Mexico for the support of common schools with the approval of the state superintendent of public instruction of said state, as to institutional grant lands with the approval of the governing body of the institution for whose benefit the lands so reconveyed were granted to said state, if, in the opinion of the secretary of agriculture, public interests will be benefited thereby and the lands are chiefly valuable for national forest purposes, and in exchange therefor, the secretary of the interior, in his discretion, may give not to exceed an equal value of unappropriated, ungranted, national forest or other government land belonging to the United States within the said state of New Mexico, as may be determined by the secretary of agriculture and be acceptable to the state as a fair compensation, consideration being given to any reservation which either the state or the United States may make of timber, mineral or easements.

Authority is hereby vested in the president temporarily to withdraw from disposition under the Act of June 25, 1910 (Thirty-Sixth Statutes at Large, page 847), as amended by the act of August 24, 1912 (Thirty-Seventh Statutes at Large, page 497), lands proposed for selection by the state under the provisions of this act. (As amended April 1, 1926, 44 Stat. 228, ch. 96; June 15, 1926, 44 Stat. 746, ch. 590, 1; August 28, 1957, 71 Stat. 457, Pub. L. 85-180; August 7, 1997, 111 Stat. 1113, Pub. L. 105-37.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For waiver of restrictions, *see* N.M. Const., art. XIII, § 3.

The 1997 amendment, inserted "The trust funds, including all interest, dividends, other income, and appreciation in the market value of assets of the funds shall be prudently invested on a total rate of return basis. Distributions from the trust funds shall be made as provided in Article 12, Section 7 of the Constitution of the State of New Mexico" at the end of the first paragraph.

Through Public Law 105-37, Congress consented to the 1996 amendments of N.M. Const., art. VIII, § 10 and N.M. Const., art. XII, §§ 2, 4 and 7.

Compiler's notes. — The Act of Aug. 28, 1957 deleted the seventh paragraph which read: "A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this act conveyed or confirmed. 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. The state treasurer shall keep all such moneys invested in safe interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto as defined by this act and the laws of the state not in conflict herewith."

Act of June 15, 1926, 44 Stat. 746, ch. 590 contained the following additional sections:

"Sec. 2. Where sections 2, 16, 32, and 36, within national forests, legal title to which sections is retained in the United States under the provisions of section 6 of the said Act of June 20, 1910, and which sections are administered as a part of the said national forests for the benefit of the said state of New Mexico, have not already been tendered as base for indemnity selection under sections 2275 and 2276, United States Revised Statutes, and where such sections of land, in the opinion of the secretary of agriculture, are chiefly valuable for forest purposes, upon surrender by the state of New Mexico of the right to make lieu selections and of all claim, right, or interest in or to said sections upon and in the event of elimination from the national forests, the secretary of the interior, in consideration of such surrender, may, in his discretion, give to the state of New Mexico not to exceed an equal value of unappropriated, ungranted, national forest or other government land belonging to the United States within the said state of New Mexico, as may be determined by the secretary of agriculture and be acceptable to the state as a fair compensation, consideration being given to any reservation which either the state or the United States may make of timber, mineral, or easements.

"That the secretary of agriculture may establish regulations and a procedure for appraising the values of the lands owned by the United States and by the state and for carrying out the provisions of this act.

"Sec. 3. That all lands acquired by the state of New Mexico under the provisions, and all the products and proceeds of said lands, shall be subject to all the conditions and trusts to which the lands conveyed or surrendered in lieu thereof are now subject. All lands conveyed to the United States under this act shall, upon acceptance of title, become parts of the national forests within which they are situated.

"Sec. 4. That pursuant to section 10, article XXI, Constitution of the state of New Mexico, the consent of the United States is hereby granted for amendment of the Constitution of the state of New Mexico in accordance with the provision of this act." Also see, N.M. Const., art. XIII, § 3.

The restrictions of this section as to issuance of a patent to a portion of a tract of land sold under contract when only that part covered by the patent had been paid for and the balance due under the contract had not been paid at the time the patent was issued were waived as to patents issued prior to September 4, 1956 by Act of May 27, 1961, 74 Stat. 85, P.L. 87-40.

Section became part of fundamental law to same extent as if it had been directly incorporated into the constitution when expressly consented to by the state and its people in N.M. Const., art. XXI, § 9. *State ex rel. Interstate Stream Comm'n v. Reynolds*, 1963-NMSC-023, 71 N.M. 389, 378 P.2d 622.

No constitutional amendment necessary for relocation of land grant beneficiary. — So long as the seven institutions named in N.M. Const., art. XIV, § 1, remain named as the land grant beneficiaries, no amendment of that section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

Authority of commissioner. — Under Enabling Act, constitution and statutes based thereon, commissioner of public lands has complete dominion over state lands. *Burguete v. Del Curto*, 1945-NMSC-025, 49 N.M. 292, 163 P.2d 257.

Limitations thereon. — Land commissioner's dominion over state lands is subject to restrictions imposed by Enabling Act, constitution and statutes, and the manner of its exercise is subject to judicial review. *State ex rel. Del Curto v. District Court*, 1947-NMSC-032, 51 N.M. 297, 183 P.2d 607, criticized, *State ex rel. Swayze v. District Court*, 1953-NMSC-040, 57 N.M. 266, 258 P.2d 377; *Burguete v. Del Curto*, 1945-NMSC-025, 49 N.M. 292, 163 P.2d 257.

In selling lands belonging to the state and issuing patents therefor, the commissioner of public lands is merely an agent of the state and has those powers, and only those powers, given by law. *Zinn v. Hampson*, 1956-NMSC-088, 61 N.M. 407, 301 P.2d 518.

Meaning of "dispose." — The use of the word "dispose" in Section 10 of the Enabling Act does not grant the land commissioner additional, residual authority to convey trust land beyond a sale or lease. *State ex rel. King v. Lyons*, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

Exchanges of land. — The Enabling Act does not permit exchanges of land unless they are in-kind sales. Exchanges of land for appraised monetary value are in-kind sales that are subject to the sales provisions of Section 10 of the Enabling Act, including public auction to the highest and best bidder. The Enabling Act does not authorize the land commissioner to exchange land with private parties without application of the sale provisions of Section 10 of the Enabling Act. *State ex rel. King v. Lyons*, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

Public auction. — The requirement of Section 10 of the Enabling Act that public land be sold at public auction to the highest and best bidder provides for objective selection

of the winning bid, while ensuring that the sale is open to competitive bidding. Competition is the means and the essential element by which an auction achieves the primary goal of obtaining the best return for the seller. Bargaining and negotiation between buyers and sellers or between buyers prior to sale negates the essence of what it means to have a public auction free and open to competition. *State ex rel. King v. Lyons*, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

Exchanges of land violated the Enabling Act. — Where private property owners applied to the land commissioner for exchanges of private land for state land; the private owners specified the land they desired to exchange for specific tracts of state land; the land commissioner appraised the exchange proposal for the land's values and the ability of the exchange to ameliorate management and access issues; the land commissioner negotiated with the private owners over an extensive period of time to plan a sale to meet the interests of the land commissioner and the private owners; the land commissioner's interest in the exchanges was to reduce "checkerboard" ownership of state land and to consolidate state land into larger, contiguous parcels to improve land management and reduce boundary and access issues; and after the parties had finalized their negotiations for the exchanges, the land commissioner published a notice of public auction offering the state land that had been agreed upon for exchange with the private owners, as a matter of law, the exchanges violated the requirement of Section 10 of the Enabling Act that state lands be sold or leased to the highest and best bidder at a public auction. *State ex rel. King v. Lyons*, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

Exchange of state trust lands. — The commissioner of public lands may not exchange state trust lands for lands of equal value whether held in private ownership or by other state agencies, local governing bodies, trust land beneficiary institutions and federal agencies, other than the Department of the Interior. 1988 Op. Att'y Gen. No. 88-35.

Statute not applicable. — Territorial statute declaring all public lands common pastures necessarily referred to common use of public domain and had no application to lands selected by state under congressional grant where there were no public lands in territory, other than federal land, at time statute was passed. *Makemson v. Dillon*, 1918-NMSC-040, 24 N.M. 302, 171 P. 673.

Drainage Act, as applicable to state lands, contravened this section as ratified and accepted by state constitution. *Lake Arthur Drainage Dist. v. Field*, 1921-NMSC-043, 27 N.M. 183, 199 P. 112. *But see Lake Arthur Drainage Dist. v. Board of Comm'rs*, 1924-NMSC-002, 29 N.M. 219, 222 P. 389, approving special assessment against county for benefits to highways.

Comparison with Arizona act. — Although the Arizona and New Mexico Enabling Acts were in part combined, there have been substantial changes in the Arizona Act since the passage of the combined act. The New Mexico Enabling Act, on the other hand, has not been changed in this respect, and its Section 10 is entirely different from Section 28

of the Arizona act. *United States v. 41,098.98 Acres of Land*, 548 F.2d 911 (10th Cir. 1977).

Tingley Hospital to retain entitlement to funds upon relocation. — If the Carrie Tingley Crippled Children's Hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in N.M. Const., art. XIV, § 1, it would retain its entitlement to the funds derived from lands granted under this act. 1980 Op. Att'y Gen. No. 80-16.

Conditions which govern sale of timber need not be applied to the disposition of firewood. 1980 Op. Att'y Gen. No. 80-13.

Law reviews. — For note, "Constitutionality of Educational Land Grants and Mississippi State Property Interests Under Review in Papasan v. Allain," see 28 Nat. Resources J. 199 (1988).

II. LAND, PROCEEDS IN TRUST.

Trust created in Enabling Act is binding and enforceable and the legislature is without power to divert the fund for another purpose than that expressed. *State ex rel. Interstate Stream Comm'n v. Reynolds*, 1963-NMSC-023, 71 N.M. 389, 378 P.2d 622.

Interest on deposits derived directly or indirectly from schools or institutional lands belongs to the fund or institution whose property produces it. 1923-24 Op. Att'y Gen. 151.

Authorized uses of funds. — Proceeds of lands granted by this act constitute permanent funds and may be used for support of state institutions. *State v. Llewellyn*, 1917-NMSC-031, 23 N.M. 43, 167 P. 414, cert. denied, 245 U.S. 666, 38 S. Ct. 63, 62 L. Ed. 538 (1917).

Since bonds of university of New Mexico, when issued, are valid obligations of university and not of state, use of income from granted lands to pay interest and provide a sinking fund does not violate this section. *State v. Regents of Univ. of N.M.*, 1927-NMSC-047, 32 N.M. 428, 258 P. 571.

Oil royalties derived from lands originally granted to territory by Ferguson Act (30 Stat. 484), and confirmed by this section, are a part of the permanent funds of the university of New Mexico, and only the income therefrom can be used for current income for that institution. *Regents of Univ. of N.M. v. Graham*, 1928-NMSC-004, 33 N.M. 214, 264 P. 953.

In state statute creating state land office, provisions constituting 20% of income from state lands as a trust fund, known as the state lands maintenance fund, and authorizing payment of salaries and expenses of state land office from such fund did not violate trust created by Enabling Act. *United States v. Swope*, 16 F.2d 215 (8th Cir. 1926).

Appropriation of proceeds of lands for investigations as to irrigation and reclamation is valid. *State ex rel. Yeo v. Ulibarri*, 1929-NMSC-051, 34 N.M. 184, 279 P. 509.

Prohibited uses. — Use of funds from granted lands for advertising resources and advantages of state would be a breach of trust, and state land commissioner was enjoined from so using them. *Ervien v. United States*, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919).

Funds derived from sources other than appropriations made by the legislature for the school for the deaf are beyond the control of the board of educational finance or the legislature itself and no deduction can be made by the new board from these funds for their administrative expenses. 1951-52 Op. Att'y Gen. No. 5468.

Irrigation district has no clear legal right to draw on income from land grant by congress, the use of which was limited to establishment of reservoirs and hydraulic engineering, and mandamus directed to the drawing of warrant thereon will be denied. *Carson Reclamation Dist. v. Vigil*, 1926-NMSC-019, 31 N.M. 402, 246 P. 907.

No restrictions, in terms, on class of interest-bearing securities in which funds may be invested were imposed by this section, 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 this act, would seem to vest in them power to exclude any given class of securities which might, in their judgment, be deemed unsafe. *State v. Marron*, 1913-NMSC-092, 18 N.M. 426, 137 P. 845 (case decided under former paragraph relating to proper investment of proceeds from grant lands; see compiler's note above).

Municipal revenue bonds are not permissible investment under this section. 1957-58 Op. Att'y Gen. No. 58-207. (Opinion rendered prior to deletion of paragraph in this section relating to proper investment of proceeds from grant lands; see compiler's note above.)

III. ENCUMBRANCE, SALE AND LEASE.

Pledging of proceeds. — This section does not prohibit pledging of proceeds of sale and leasing of lands, donated to New Mexico in trust by act May 28, 1928, ch. 812, 45 Stat. 775, for purpose of retiring debentures issued to liquidate debts due certain counties and towns for previously paid bond principal and interest. *State v. State Bd. of Fin.*, 1929-NMSC-088, 34 N.M. 394, 281 P. 456.

Proposed debentures in Laws 1921, ch. 81 do not come under the prohibition of this section, as it does not prohibit pledging the proceeds from the sale of lands. 1921-22 Op. Att'y Gen. 59.

Assignment of state grazing lease as collateral security does not violate this section. *American Mtg. Co. v. White*, 1930-NMSC-030, 34 N.M. 602, 287 P. 702.

Where grazing lease executed by land commissioner was assigned by lessee as security for debt and commissioner approved the assignment, lien of creditor attached to any renewal of lease regardless of whether lessee had any legal right to a renewal. *Scharbauer v. Graham*, 1933-NMSC-043, 37 N.M. 449, 24 P.2d 288.

Alienation of public lands. — Lands transferred and confirmed to territory by this section were hedged about with the strictest precautions as to alienation, in the interest of the trust they were intended to serve. *In re Dasburg*, 1941-NMSC-024, 45 N.M. 184, 113 P.2d 569.

Commissioner has power to alienate public lands held in trust for public schools, but no right to such lands can be acquired by circumvention or any indirect method. *In re Dasburg*, 1941-NMSC-024, 45 N.M. 184, 113 P.2d 569.

Right to dispose of mineral land is not restricted, except as to manner of advertising and sale (assuming minerals to be included within meaning of "natural products"). The prohibition against sale of mineral lands is statutory. *State ex rel. Otto v. Field*, 1925-NMSC-019, 31 N.M. 120, 241 P. 1027.

Timber land. — Congressional and state legislation imposed no restrictions or limitations upon the sale of timber land different from the sale of any other state lands. 1915-16 Op. Att'y Gen. 283.

Reservation authorized. — Under Enabling Act, constitution and statutes, commissioner of public lands may sell or hold state lands at his discretion and may reserve the minerals to the fund or institution to which the land belongs, when making a sale thereof. *State ex rel. Otto v. Field*, 1925-NMSC-019, 31 N.M. 120, 241 P. 1027.

State, through commissioner of public lands, properly reserved minerals and mineral rights in selling, and in issuing its patent to, school and asylum lands granted to it by the government, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. *Terry v. Midwest Ref. Co.*, 64 F.2d 428 (10th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933).

The state was not collaterally estopped by the decision in *Roe v. State ex rel. State Hwy. Dep't,* 103 N.M 517, 710 P.2d 84 (1985), from questioning whether sand and gravel are "minerals" as that term is used in general mineral reservations because the question is to be answered on a case-by-case basis, and because public policy considerations militated against application of the doctrine of collateral estoppel against the government. *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184.

Advertising and public sale. — A lease of saline lands by the land commissioner can be made only after advertisement and public sale. 1923-24 Op. Att'y Gen. 1.

Right of renewal invalid. — No statute can grant an absolute right of renewal of a five-year lease under any terms or conditions, for it would violate the Enabling Act. *State ex rel. McElroy v. Vesely*, 1935-NMSC-096, 40 N.M. 19, 52 P.2d 1090.

In view of this section, there can be no absolute right to renew a state land lease. *Ellison v. Ellison*, 1944-NMSC-012, 48 N.M. 80, 146 P.2d 173.

Bidding requirements violated. — The practice of allowing the relinquishment of a lessee's existing leases on grazing or agricultural lands subject to the Enabling Act, and application for a new consolidated lease, having the net result of a lease of more than five years' duration without the opportunity for competitive bidding or adverse applications as provided by law, is beyond the discretion of the commissioner of public lands. 1969 Op. Att'y Gen. No. 69-67.

Provisions requiring advertising sale of granted lands and natural products thereof, as well as leases for more than a certain period, do not apply to right-of-way easements for state highways or for the taking of sand and gravel to be used in highway construction upon such land. *State ex rel. State Hwy. Comm'n v. Walker*, 1956-NMSC-080, 61 N.M. 374, 301 P.2d 317.

Title to land retained until purchase price paid. — Legal title to state land is retained by the state until the full purchase price by a buyer is paid. When there is default, the state's remedy is to retain whatever money the purchaser has paid as liquidated damages since the state cannot enforce specific performance of the contract. *Romero v. State*, 1982-NMSC-028, 97 N.M. 569, 642 P.2d 172.

Patents withheld until full payment. — There is no specific authority given the commissioner of public lands to issue a patent to a portion of a tract of land sold under contract when only that part covered by the patent has been paid for and the balance due under said contract has not been paid at the time the patent is issued. *Zinn v. Hampson*, 1956-NMSC-088, 61 N.M. 407, 301 P.2d 518.

Where pursuant to this section a tract of public land was sold by a 30-year purchase contract, after which sale, but before full payment, various assignments and parceling occurred, the state could honor the assignment of the purchase contract and the assignee of vendee's interest in 10 parcels for which it had paid could have equitable title thereto, but it could not receive patents for the parcels until the contract was fully and completely performed. 1957-58 Op. Att'y Gen. No. 58-206.

Rental price not restricted. — Where a statute required leasing of state lands at 2% of their appraised value, it was erroneous to assume that the minimum rental must be 2% of the $5.00 per acre minimum sale price set by congress in the Enabling Act, as the appraised value might be less than the purchase price prescribed. *Makemson v. Dillon*, 1918-NMSC-040, 24 N.M. 302, 171 P. 673.

Commissioner of public lands could charge state for rights-of-way or easements for state highways across lands which were granted and confirmed to the state of New Mexico in trust for various state institutions and agencies by the Enabling Act when New Mexico was admitted to statehood and for sand and gravel removed from such lands for the use solely in constructing public highways across the trust lands. *State ex rel. State Hwy. Comm'n v. Walker*, 1956-NMSC-080, 61 N.M. 374, 301 P.2d 317.

The general law that an agency of the state is not to be charged for the use of state property unless specific provision be made therefor is not applicable when dealing with lands granted in trust by the United States, under restrictions so exact they permit no license of construction or liberties of inference. *State ex rel. State Hwy. Comm'n v. Walker*, 1956-NMSC-080, 61 N.M. 374, 301 P.2d 317.

Well and pump development not reclamation project. — The development of water and its application to land by means of wells and pumps cannot properly be considered as a project for the reclamation of lands, and state land irrigable in such manner is not subject to the restriction of being sold at not less than $25 per acre. 1914 Op. Att'y Gen. 143.

Mineral lease not intended. — Provisions of Enabling Act with reference to sale and leasing of granted lands do not embrace a lease for mineral purposes, and it follows that the state is not controlled nor restricted by said act in regard to leasing such lands for mineral purposes. *Neel v. Barker*, 1922-NMSC-002, 27 N.M. 605, 204 P. 205.

Oil and gas exploration. — Restrictions of Enabling Act in regard to alienation of granted lands, or the use thereof, or the natural products thereof, do not apply to grant or lease to explore for oil or gas executed by commissioner of public lands. *Neel v. Barker*, 1922-NMSC-002, 27 N.M. 605, 204 P. 205.

A lease executed by the commissioner of public lands to explore on public lands for oil and gas is not affected by the terms of this act. 1925-26 Op. Att'y Gen. 43.

Lease or sale of sand and gravel. — Neither the Enabling Act, the New Mexico constitution nor statutes preclude the land commissioner from leasing or selling the sand and gravel in state lands. *Jensen v. State Hwy. Comm'n*, 1982-NMSC-031, 97 N.M. 630, 642 P.2d 1089, cert. denied, 459 U.S. 838, 103 S. Ct. 86, 74 L. Ed. 2d 80 (1982).

IV. ENFORCEMENT.

Remedy exclusive. — The phrase, "it shall be the duty of the attorney general" indicates that proceedings brought by the attorney general are the exclusive remedy under this act. A collateral attack in condemnation proceedings on grazing lessees' ownership does not properly raise an issue, and the leases must be considered valid in the absence of special proceedings against the state by the attorney general brought

under the Enabling Act. *United States v. 41,098.98 Acres of Land*, 548 F.2d 911 (10th Cir. 1977).

Citizen may not enjoin governor and other state officers from expending public fund on ground that statute authorizing such expenditure violates trust conditions of land grant funds, it having been made duty of the United States attorney general to enforce the trust conditions. *Asplund v. Hannett*, 1926-NMSC-040, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573.

Neither this section, nor N.M. Const., art. XXI, § 9, gives a citizen the right to sue to enjoin misapplication of proceeds of land grants. *Asplund v. Hannett*, 1926-NMSC-040, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573.

Neither constitution nor Enabling Act gives citizen-taxpayer the right to enjoin governor and state officers from making expenditures from "permanent reservoirs for irrigating purposes, income fund," upon ground of trust violation. *Asplund v. Hannett*, 1926-NMSC-040, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573.

State does not hold granted lands and proceeds in trust, but by contract. A private citizen cannot sue to control disposition of fund, the United States alone being entitled to sue. *Downer v. Graham*, 21 F.2d 732 (8th Cir. 1927).

Mandamus. — State treasurer must invest school funds in safe, interest-bearing securities, and he may be compelled to do so by mandamus. *State v. Marron*, 1913-NMSC-092, 18 N.M. 426, 137 P. 845.

Mandamus on relation of the commissioner of public lands lay to prevent use, pursuant to statute, of funds from lands granted under the Enabling Act for general governmental purposes. *State ex rel. Shepard v. Mechem*, 1952-NMSC-105, 56 N.M. 762, 250 P.2d 897.

Sec. 11. Selection of lands by state; surveys.

All lands granted in quantity or as indemnity by this act shall be selected, under the direction and subject to the approval of the secretary of the interior, from the surveyed, unreserved, unappropriated and nonmineral public lands of the United States within the limits of said state, by a commission composed of the governor, surveyor general or other officer exercising the functions of a surveyor general, and the attorney general of the said state; and after its admission into the union said state may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public land grants made to said state in the same manner prescribed for the procurement of such surveys by Washington, Idaho and other states by the act of congress approved August eighteenth, eighteen hundred and ninety-four (Twenty-Eighth Statutes at Large, page three hundred and ninety-four), and the provisions of said act, insofar as they relate to such surveys and the preference right of selection, are hereby extended to the said state of New Mexico. The fees to be paid to the register

and receiver for each final location or selection of one hundred and sixty acres made hereunder shall be one dollar [($1.00)].

ANNOTATIONS

Words "subject to the approval" of secretary of interior do not give him the right arbitrarily to refuse a selection, but mean that he shall determine after investigation. *Makemson v. Dillon*, 1918-NMSC-040, 24 N.M. 302, 171 P. 673.

Vesting of title in school land was dependent upon survey, and notwithstanding language of act "survey in the field," it must be interpreted as a completed survey finally approved by the secretary of the interior. *United States ex rel. N.M. v. Ickes*, 72 F.2d 71 (D.C. Cir.), cert. denied, 293 U.S. 596, 55 S. Ct. 111, 79 L. Ed. 689 (1934).

Sec. 12. Confirmation of grants previously made to New Mexico territory.

All grants of lands heretofore made by any act of congress to said territory, except to the extent modified or repealed by this act, are hereby ratified and confirmed to said state, subject to the provisions of this act: provided, however, that nothing in this act contained shall, directly or indirectly, affect any litigation now pending and to which the United States is a party, or any right or claim therein asserted.

Sec. 13. United States district court.

The state, when admitted as aforesaid, shall constitute one judicial district, and the district court of said district shall be held at the capital of said state, and the said district shall, for judicial purposes, be attached to the eighth judicial circuit. There shall be appointed for said district one district judge, one United States attorney and one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States, payable as provided for by law, and shall reside in the district to which he is appointed. There shall be appointed a clerk of said court, who shall keep his office at the capital of said state. The regular terms of said court shall be held on the first Monday in March and the first Monday in September of each year. The district court for said district, and the judges thereof shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other district court and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney and the clerks [clerk] of the district court of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the territory of New Mexico. (As amended March 4, 1921, 41 Stat. 1361, ch. 149.)

ANNOTATIONS

Compiler's notes. — New Mexico is now in the tenth circuit. *See* 28 U.S.C. § 211.

Sec. 14. Pending litigation; jurisdiction and succession of courts.

All cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the supreme court of the United States or in the proper circuit court of appeals upon any record from the supreme court of said territory, and all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the supreme court of the United States upon any record from a district court of said territory or in any matter of habeas corpus upon any return or order of a district judge thereof, and all and singular the cases aforesaid which, hereafter shall be so lawfully prosecuted and remain pending in the supreme court of the United States or in the proper circuit court of appeals, may be heard and determined by the supreme court of the United States or the proper circuit court of appeals, as the case may be. And the mandate of execution or of further proceedings shall be directed by the supreme court of the United States or the circuit court of appeals to the circuit or district court, hereby established within the said state, or to the supreme court of such state, as the nature of the case may require. And the circuit, district and state courts herein named shall respectively be the successors of the supreme court and of the district courts of the said territory as to all such cases arising within the limits embraced within the jurisdiction of said courts, respectively, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees or other determinations of any court of the said territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals and writs of error to the supreme court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said state into the union.

ANNOTATIONS

Limits of review. — This section does not give federal court of appeals the right to review decisions of state supreme court, its review being expressly limited to judgments of courts of the territory. *Lovato v. New Mexico*, 220 F. 104 (8th Cir. 1915).

Sec. 15. State and federal courts; jurisdiction; transfer of federal cases pending litigation.

The said circuit or the said district court, as the case may be, shall have jurisdiction to hear and determine all trials, proceedings and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the supreme court of the said territory at the date of its admission as a state, the case being such that, under the laws of the United States touching the jurisdictions of federal courts, it might properly have been begun in or (as a separable controversy or otherwise) removed to said circuit or said district court, had they been established when the litigation of such case or controversy was commenced. Should such case or

controversy be such that, if begun within a state, it would have fallen within the exclusive original cognizance of a circuit or district court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said state of New Mexico, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent but not the exclusive jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts, and not later than sixty days after the lodgment of the record of such case or controversy in the proper court of the state, as herein provided. All cases and controversies pending at the admission of the state, and not transferable to the said circuit or district court under the foregoing provision, shall be heard and determined by the proper court of the state. All files, records and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district and state courts, respectively, in such wise and so authenticated or proven as such courts shall, respectively, by rule direct, and upon transfer of any case or controversy, as herein provided, the same shall be proceeded with in due course of law; and no writ, action, indictment, information, cause or proceeding pending in any court of the said territory at the time of its admission as a state shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States, or state court, as the case may be: provided, however, that all cases pending and undisposed of in the supreme court of the said territory at the time of the admission thereof as a state shall be transferred, together with the records thereof, to the highest appellate court of the state, and shall be heard and determined thereby, and appeal to and writ of error from the supreme court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts: provided further, that all cases so pending in said territorial supreme court in which the United States is a party or which, if instituted within a state, would have fallen within the exclusive original cognizance of a circuit or district court of the United States, shall, with the records appertaining thereto, be transferred to the circuit court of appeals for the eighth circuit, and be there heard and decided; and any such case which, if finally decided by the supreme court of the territory, would have been in any manner reviewable by the supreme court of the United States, may in like manner and with like effect be so reviewed after final decision thereof by said circuit court of appeals. Transfers of all files and records from the said territorial supreme court to the highest appellate court of the state and to the said circuit court of appeals, shall be accomplished in such manner and under such proofs and authentications as the two last-mentioned courts shall respectively by rule prescribe.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said territory as a state, but as to which no suit, action or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the courts of said state and the said circuit or district courts of the United States sitting therein, and to review in the appellate courts of such respective sovereignties in like manner and to the same extent as if said state had been created

and such circuit, district and state courts had been established prior to the accrual of such causes of action and the commission of such offenses; and in effectuation of this provision such of the said criminal offenses as shall have been committed against the laws of the said territory shall be tried and punished by the appropriate courts of the said state, and such as shall have been committed against the laws of the United States shall be tried and punished in the circuit or district courts of the United States.

All suits and actions brought by the United States in which said territory is named as a party defendant, which shall be pending in any court of said territory at the date of its admission hereunder, shall be transferred as herein provided; and the said state shall be substituted therein and become a party defendant thereto in lieu of said territory.

ANNOTATIONS

Compiler's notes. — New Mexico is now in the tenth circuit. *See* 28 U.S.C. § 211.

Transfer to state court. — Action which, if commenced within a state, would have fallen within concurrent rather than exclusive jurisdiction of a federal court was transferred to proper state court. *United States v. Alamogordo Lumber Co.*, 202 F. 700 (8th Cir. 1912).

Sec. 16. First legislative assembly; certification of election of senators and representatives; territorial laws continued in force.

The members of the legislature elected at the election hereinbefore provided for may assemble at Santa Fe, organize and elect two senators of the United States in the manner now prescribed by the constitution and laws of the United States; and the governor and secretary of state of the proposed state shall certify the election of the senators and representatives in the manner required by law; and the senators and representatives so elected shall be entitled to be admitted to seats in congress and to all rights and privileges of senators and representatives of other states in the congress of the United States; and the officers of the state government formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of state officers; and all laws of said territory in force at the time of its admission into the union shall be in force in said state until changed by the legislature of said state, except as modified or changed by this act or by the constitution of the state; and the laws of the United States shall have the same force and effect within the said state as elsewhere within the United States.

Sec. 17. Appropriation to defray expenses incident to elections and conventions.

The sum of one hundred thousand dollars [($100,000)], or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, for defraying all and every kind and character of expense incident to the elections and convention provided for in this act; that is, the payment of the expenses of

holding the election for members of the constitutional convention and the election for the ratification of the constitution, at the same rates that are paid for similar services under the territorial laws, and for the payment of the mileage for and salaries of members of the constitutional convention at the same rates that are paid to members of the said territorial legislature under national law, and for the payment of all proper and necessary expenses, officers, clerks and messengers thereof, and printing and other expenses incident thereto: provided, that any expense incurred in excess of said sum of one hundred thousand dollars [($100,000)] shall be paid by said state. The said money shall be expended under the direction of the secretary of the interior, and shall be forwarded, to be locally expended in the present territory of New Mexico, through the secretary of said territory as may be necessary and proper, in the discretion of the secretary of the interior, in order to carry out the full intent and meaning of this act.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler.

Sec. 18. Saline lands; reservation.

All saline lands in the proposed state of New Mexico are hereby reserved from entry, location, selection or settlement until such time as congress shall hereafter provide for their disposition.