

November 28, 1933

Mr. Howard S. Reed  
State Engineer, P.W.A.  
Professional Building  
Phoenix, Arizona

Re: Board of Regents of the University  
of Arizona.  
Docket No. 2259

In response your letter November 10, 1933.

Dear Sir:

With reference to your communication and answering the enclosed letter of Paul D. Shriver, Attorney, Public Bodies Section, Legal Division, dated November 10, 1933, we have the following comments and suggestions to offer:

The University of Arizona was established under and by virtue of the provisions of Chap. 4, Title 56, of the Revised Statutes of the Territory of Arizona 1901, approved March 2, 1901.

Section 1 of Article XI of the Constitution of the State of Arizona provides that:

"The Legislature shall enact such laws as shall provide for the establishment and maintenance of a university."

Section 5 of Article XI of the Constitution of the State of Arizona provides that:

"The regents of the University of Arizona \*\*\*\*\* shall be appointed by the Governor, except that the Governor shall be ex-officio, a member of the board of regents of the University."

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Section 1132 of the Revised Code of Arizona 1928 provides as follows:

"The regents of said university shall constitute a body corporate with a name and style 'Board of Regents of the University of Arizona' and by that name shall be known; shall have perpetual succession; may sue and be sued; may purchase, receive, hold, and sell property, real and personal, for the benefit of the State of Arizona and the use of said university; may contract and be contracted with; and adopt a corporate seal."

Section 25 of the Arizona Enabling Act makes certain land grants to the State of Arizona for several specified purposes among which are the following:

"for university purposes 200,000 acres \*\*\*\*\* "

It will be noticed that there is no limitation whatsoever upon the use of this money for any other purpose except the broad general appropriation for university purposes. In the same section and paragraph certain lands were granted to pay the interest and principal on certain outstanding bonded indebtedness of certain counties in Arizona, and it was provided that after the payment of said debts:

"such remainder of lands and proceeds of sales thereof shall be added to and become a part of the permanent school fund of said state, the income therefrom only to be used for the maintenance of the common schools of said state."

It will be therefore noticed that Congress placed a definite limitation upon the use of the money derived from this agency granted to the common schools by limiting its use to maintenance.

The only limitation contained in the Enabling Act with reference to the land grants for university purposes is contained in Section 26 of the Enabling Act which provides that:

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no portion of the funds derived from the sale or disposal of the lands or the leasing thereof shall be used for the support of any sectarian or denominational school, college, or university.

Article X of the Constitution of the State of Arizona accepted the grant of lands and accepted the trust subject to the terms and conditions of the Enabling Act.

Insofar as the lands granted for the benefit of the University are concerned, the monies derived from the sale of said lands become a trust fund which it is not the intention or purpose of the Board of Regents of the University of Arizona to encumber in any manner. It is proposed by the Board of Regents of the University of Arizona to obligate the income from this fund to amortize and pay the principal on the proposed debt.

Section 10 of Article XI of the Constitution of the State of Arizona provides that:

"The revenue for the maintenance of the respective State educational institutions shall be derived from the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the Enabling Act approved June 20, 1910, or other legislative enactment of the United States, for the use and benefit of the respective State educational institutions. In addition to such income the Legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all State educational institutions, and shall make such special appropriations as shall provide for their development and improvement."

Pursuant to the mandates of the Enabling Act and Article X of the Constitution, the Legislature of Arizona enacted Section 3018 of the Revised Code of Arizona 1928, which creates the university land fund, Section 3020 which creates the agricultural and mechanical college and school of mines land fund, and Section 3021 which

creates the military institutes land fund. These separate provisions of the code provide that the several funds:

"shall consist of the proceeds of all lands granted to this state by the United States (for the several purposes), of all property given by individuals for like purposes unless the terms of such gifts shall otherwise provide, and of the sale of timber, minerals, gravel, or other natural products of property from lands granted or given for university purposes. Such fund shall be and remain a perpetual fund for the benefit and support of the University of Arizona (or other colleges mentioned), the interest of which only together with the monies derived from the rental of said lands and property shall be used."

The Legislature of the State of Arizona in construing the Enabling Act and the Constitution appropriated for the use of the body corporate, 'the Board of Regents of the University of Arizona', the income from the several land funds in Section 1137 of the Revised Code of Arizona 1928, which provides as follows:

"The Board may expend such portion of the income of the university land fund, the university timber land fund, the university fund, and of all other funds provided for said university for the maintenance and development of the grounds of the university, for the erection upon such grounds of suitable buildings, for the purchase of apparatus and equipment therefore, for the purchase, development, and extension of a library, and for the support and maintenance of the university, as it deems expedient, not inconsistent with the provisions of any appropriation. All money secured by the university from the United States of America under special acts of Congress for specific purposes shall be deposited in a special fund by said Board and administered in accordance with the purposes of said act of Congress."

This section had its origin in Section 3637, Revised Statutes 1901, which read as follows:

"The Board of Regents are authorized to expend such portions of the income of the university funds and funds hereinafter provided for said university, as

they may deem expedient for the erection of suitable buildings upon the grounds hereinafter provided for, and for the purchase of apparatus and library and a cabinet of natural history and mineralogy."

In further compliance with the mandate contained in Section 10 of Article XI of the Constitution of Arizona, the Legislature of Arizona in Section 1155 of the Revised Code of Arizona 1928, as amended in Chapter 7 of the Regular Session of the Eleventh Legislature, provides that:

"There shall be appropriated in the general appropriation bill, for each fiscal year, a sum of money, not less than eighty-five one hundredths of one mill on the dollar of the assessed valuation of all taxable property in the state, for the improvement, support, and maintenance of the university, including the payment of salaries, current expenses, purchase of equipment, making necessary repairs, construction of new buildings, purchase of lands, and in general for the payment of all such expenses connected with the management of said institution; and the state board of equalization shall, upon determining the aggregate assessed valuation of all taxable property within the state, compute the amount of money so determined, and certify the same over its seal, to the state auditor and state treasurer. All the amounts so appropriated shall be paid as other claims against the state are paid. The balance of the amount so appropriated, if any, remaining on hand at the end of the fiscal year, shall not revert to the general fund but shall be carried forward for the continued use for which appropriated."

It will therefore be seen that the Legislature has appropriated for the body corporate styled 'the Board of Regents of the University of Arizona' for university purposes, including maintenance and development of the grounds of the university, and for the erection upon such grounds of suitable buildings, and for other purposes, all of the income from the university land fund, the university timber land fund, the university fund, and all other funds provided for said university, not only for the maintenance and development of the grounds

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of the university but for the erection upon such grounds of suitable buildings and for other purposes, and has also made additional funds available for this purpose.

The Supreme Court of the State of Arizona had occasion to construe Section 1132 of the Revised Code of Arizona 1928 (supra) in the case of *Fairfield vs. Corbitt* (25 Ariz. 199; 215 Pac. 510). In this case it was held that under this section of the code, the Board of Regents is supreme within the scope of its duties, that the state auditor may not withhold warrants from a claimant if its claim has been approved and ordered paid by the Board, except where the claim was not for a public purpose, and that a contract for the construction of a building for university purposes is within the scope of its duties.

It is so elemental that it needs no elaborate citation of authority that the statutes existing at the time a contract is made become a part of the contract and must be read into it.

The Supreme Court of the State of Arizona in the case of *Pinal County vs. Hammons* (30 Ariz. 36, 38; 243 Pac. 919) and in the case of *Credit Company vs. Phoenix Hudson Essex Co.* (33 Ariz. 56, 60; 262 Pac. 1) held that the universal rule is that the existing statutes at the time a contract is made become a part of it and must be read into it.

The Board of Regents of the University of Arizona under the provisions of Section 1132 of the Revised Code of Arizona 1928 (supra) as a body corporate undoubtedly has the authority to enter into a contract and to bind its successors under the provisions of

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existing law during the life of the contract, and there is no provision of law placing any limit in point of time which may enter such contracts.

The proposed loan will not constitute an indebtedness of the State of Arizona but is the obligation of the body corporate, "the Board of Regents of the University of Arizona". Your attention is directed to the case of State vs. State Board of Finance (281 Pac. 456; 34 N.Mex. 394), Fanning vs. University of Minnesota (236 Northwestern 217; Minn. 38247), Barker vs. Carter (25 Pac. 2d, 747; Okla. 24397).

Under the provisions of Article X of the Constitution of Arizona the state treasurer is the custodian of the aforementioned land funds and the action of the Board of Regents in preparing to pledge the income from the said land funds, which have been appropriated for its use by the provisions of Section 1137 of the Revised Code of Arizona 1928 (supra) in no way conflicts with the duties of the state treasurer, or mortgages or pledges or affects in any manner the principal of said funds, nor is there any attempt by the Board to bind the treasurer or his successors in office other than that the treasurer and his successors in office will be required to pay out the income from the said funds for the purposes of the proposed contract.

We now come to the question raised by Mr. Shriver's letter. In the case of Roach vs. Gooding, we submit that the provisions of the Idaho Enabling Act, Constitution, and laws vary in some particulars from the Enabling Act, Constitution, and laws of Arizona, but

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we have a situation more nearly analogous to the Arizona Enabling Act and Constitution in the State of New Mexico.

The Enabling Act for New Mexico and Arizona were passed at the same time. Their provisions are almost identical. Compare Section 7 of the New Mexico Enabling Act with Section 25 of the Arizona Enabling Act.

The Legislature of the State of New Mexico authorized the Board of Regents of that state to do practically the same thing as is now proposed by the Board of Regents of the University of Arizona. The Attorney General of the state challenged the authority of the Board of Regents to carry out the provisions of the statutes of New Mexico on practically the same grounds as that raised in Mr. Shriver's letter.

The Supreme Court of the State of New Mexico (Case 3283, 258 Pac. 571) sustained the authority of the Board of Regents under the statute to issue building and improvement bonds for the construction of buildings on the university campus, and to amortize and pay the interest thereon from the income derived from the university land fund. The case is squarely in point and fully meets the objection. (State vs. Board of Regents of the University of New Mexico, 32 N. Mex. 428; 258 Pac. 571. See also Barker vs. Carter, Okla. 25 Pac. 2d, 747).

A reference to the Arizona Enabling Act indicates that Congress placed no limitation upon the use of the income from the university land fund such as is suggested in Mr. Shriver's letter, limiting it to maintenance or endowment. Congress in passing the Enabling Act

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knew its own mind; if it desired to limit the use of the funds from the sale of lands to the maintenance of the university, it would have said so but it did not. It made the interest on the fund available for university purposes. In the same paragraph, however, as has been pointed out, the residue which the common schools might derive from any surplus existing after outstanding county bonds had been paid specifically was limited by Congress for the maintenance of the common schools. Surely it cannot be argued that when Congress in the same paragraph limited the use of some funds to maintenance, if it intended to limit the use of other funds to maintenance, it would have said so and not made the broad, sweeping grant of 200,000 acres for university purposes.

Under the general rule that due weight and consideration must be given to all sections of an act or law in order to ascertain the purpose and meaning thereof, we think that Congress has by its own construction and limitations indicated its meaning. We therefore think that the State vs. Regents of the University of New Mexico lays down by far the better rule than does the case of Roach vs. Gooding.

Further, as is indicated by Section 1137 of the Revised Code of Arizona 1928 (supra), which comes down in direct line from the 1901 Code, both the Territorial Legislature and the Legislature of Arizona have construed the authority to use the income from the public lands for university purposes in the broadest meaning, and the Board of Regents of the University of Arizona have at no time restricted the use of the said money as is indicated by Roach vs. Good-

ing and by the letter of Mr. Shriver, but have used the income from the university land fund, as well as other monies, for the construction of new buildings, for repair and replacements, for maintenance, for payment of salaries, and for other university purposes.

The Supreme Court of the State of Arizona in the case of *Austin vs. Babbitt* (16 Pac. 2d, 12, 14; Ariz. 3274) discussed the custom of administrative officers and the Legislature in interpreting constitutional provisions and statutes and has held that great weight is to be given to such interpretation and said:

"This is especially true when after a long continued interpretation the Legislature re-enacts a statute without changing its language \*\*\*\*\* "

In this connection, we direct attention to the fact that the 1901 Code authorized the Board of Regents to expend land grant funds for the construction of buildings. This authority was again carried through into the revision of the Code in 1913 and again when the Code was revised in 1928, and, as has already been stated, has always been so construed by the Board of Regents of the University of Arizona, the body corporate.

Under these circumstances and conditions, we believe that the Enabling Act places no limitation (other than that the funds be not used for sectarian purposes) upon the use of these funds, provided they are used for university purposes, that the Legislature has appropriated the income from these funds for the use of the body corporate, 'the Board of Regents of the University of Arizona', that the Board of Regents by the Constitution and by law is given authority to contract, that it is within the authority of the Board of Regents to obligate the income appropriated to its use for the purposes proposed for the erection of

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buildings, and that there is no constitutional or statutory objection to its doing so, and that if there were Congress, recognizing that there might be some constitutional or legal restrictions or limitations, made provision in Subsection D of Section 203 of Title II of the National Industrial Recovery Act that these objections might be waived by the President. We do not think any waiver is necessary. We submit that the application should receive the most favorable consideration and that technicalities, if any therebe, might well be waived in view of the emergency since this project is, we believe, entirely in line with the efforts of the national administration and the state administration to stabilize the economic and social structure of the country.

Respectfully submitted,

Arthur T. LaPrade  
Attorney General  
State of Arizona