IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CATHY MOSES and PAUL F. WEINBAUM,

Plaintiffs-Petitioners,

v. No. S-1-SC-34,974

HANNA SKANDERA, Designate Secretary of Education, New Mexico Public Education Department,

Defendant-Respondent,

And

ALBUQUERQUE ACADEMY, et al.,

Defendants/Intervenors-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Sarah M. Singleton, District Judge

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BRIEF IN SUPPORT OF MOTION FOR REHEARING

I. The Part of the Decision in Question

The New Mexico Supreme Court decision in this matter states:

> Section 6 through 9 of the Enabling Act pertain to specified public lands that were granted to New Mexico to be held in trust "for the support of common schools." Enabling Act § 6. To the extent that lands "are mineral, or have been sold, reserved or otherwise appropriated or reserved by or under the authority of any act of congress," they are to be treated as all other public lands specified under Section 6 through 9 of the Enabling Act. Enabling Act § 6.
>
> > Congress contemplated that any change...to the use of the proceeds of the lands granted to the state should be effectuated by amendment to the Constitution, and ...any change in the use and application of the proceeds of these land grants may...be done by way of a constitutional amendment.
>
> *Lyons*, 2011-NMSC-004, ¶ 4 (first and third omissions in original) (internal quotation marks and citation omitted). Thus, Intervenors' argument that funds from the Mineral Lands Leasing Act that are used for the Instructional Material Fund are "federal funds which are not subject to state constitutional limitations" is without merit.

Opinion ¶ 24 (Nov. 12, 2015).

A. The Court's Decision Has Misapprehended Section 6 of the federal Enabling Act because Mineral Lands Leasing Act funds are federal funds not subject to the state's Constitution.

The Court's quotation of Section 6's phrase "are mineral, or have been sold, reserved or otherwise appropriated or reserved by or under the authority of any act of congress" is taken out of context. The more complete provision states:

> In addition to sections sixteen and thirty-six, heretofore granted to the territory of New Mexico, section 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 . . . 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 section sixteen and thirty-six, were mentioned therein . . . .

It is clear that the lands and minerals enumerated within the Court's quoted phrase are those specific sections of land being granted to New Mexico by the Enabling Act. *See Ervien v. United States*, 251 U.S. 41, 45 (1919) ("By the Enabling Act certain grants of public lands were made to New Mexico for purposes of which there was a specific enumeration."); *Lyons*, 2011-NMSC-004 (describing Sections 6, 7, and 10 of the Enabling Act as granting federal land to the State);*Neel v. Barker*, 1922-NMSC-002, ¶ 4, 27 N.M. 605, 204 P. 205, *overruled on other grounds by ASARCO Inc. v. Kadish*, 490 U.S. 605, 627-28 (1989) ("[I]t is to be observed that sections 6 to 11, both inclusive, of the Enabling Act, are the ones concerning the lands granted to the state."); *Dallas v. Swigart*, 1918-NMSC-052, ¶ 12, 24 N.M. 1, 172 P. 416 ("The conclusion is inevitable that the Enabling Act . . . evinces an intention on the part of Congress to pass an immediate title to the state to the school sections, subject only to identification by survey."). In contrast, the lands and minerals retained by the federal government and subject to

the federal Mineral Lands Leasing Act, 30 U.S.C. §§ 181 to 297 (MLLA), have never been owned by the State and are not controlled by Section 6 of the Enabling Act.

The Mineral Lands Leasing Act is a federal statute that permits the federal government to lease land it owns, or to issue permits for extraction of the materials from those lands, and provides that the federal government will pay a portion of the proceeds to the state in which the lands are located. The MLLA does not apply to lands that the Enabling Act granted to the State of New Mexico, and the Enabling Act does not apply to federal lands from which MLLA moneys are derived. MLLA Section 191 governs the disposition of moneys received by the federal governments from the leases, providing that fifty percent of it must be paid to the state and used for one of three purposes, including the "provision of public service":

> [a]ll money received from sales, bonuses, royalties including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982 [30 U.S.C. § 1701 *et seq.*], . . . shall be paid into the Treasury of the United States; and, . . . 50 per centum thereof shall be paid by the Secretary of the Treasury to the State . . . within the boundaries of which the leased lands or deposits are or were located; . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service; . . . .

30 U.S.C. § 191(a). The MLLA provides funds to the State to be used for enumerated, though broad, purposes. 30 U.S.C. § 191.

The New Mexico Instructional Materials Law (IML) uses federal funds consistent with the legislative purposes for which they must be used by the State under the MLLA, which, as amended in 1975, permits states to use these funds for "(i) planning, (ii) construction and maintenance of facilities, and (iii) provision of public service." 30 U.S.C. § 191(a). By helping all resident students to achieve a quality education, the IML performs a "public service" that is consistent with the purpose of the MLLA.

The MLLA funds, as federal funds, are not subject to state constitutional limitations. *See State ex rel. Wyo. Farm Loan Bd. v. Herschler*, 622 P.2d 1378, 1386-87 (Wyo. 1981) (concluding bonds funded by MLLA proceeds "are . . . not subject to the [state] constitutional debt limitations"). In *Herschler*, the court considered whether bonds, to be paid only from MLLA funds, were subject to state constitutional limitations on debt, and concluded that they were not, because "[s]uch bonds are to be paid only from revenue obtained from the federal government pursuant to 30 U.S.C. § 191 . . . ." *Id.* In *Lawrence County. v. Lead-Deadwood School District No. 40-1*, the United States Supreme Court held that payments made to local governments under 31 U.S.C. § 6902 (which requires an offset for MLLA funds received) in lieu of taxes for federally owned land within

local government jurisdictions were governed by the federal statute which required them to be used "for any governmental purpose." 469 U.S. 256, 269-70 (1985). The United States Supreme Court concluded that state law could not limit the use of the funds, as they were not subject to state limitations on expenditures of state taxes. *Id.* at 268. This Court's decision, however, attempts to subject Congress' authorization for the use of federal MLLA funds to state constitutional limitations. This violates the Supremacy Clause. *See* United States Constitution, Article VI, Clause 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . , shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.").

The Legislature cannot appropriate federal funds that are provided for use by the State for a specific purpose. *See State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 51, 86 N.M. 359, 524 P.2d 975 ("[O]ur Legislature . . . has no power to appropriate and thereby endeavor to control the manner and extent of the use or expenditure of Federal funds made available to our institutions of higher learning.").

Indeed, in its annual budgets, the Legislature has been careful to specify that money directed to the instructional material fund comes from MLLA receipts. The annual General Appropriation Act for 2014 defines the general fund as including

"federal [MLLA] receipts and those payments made in accordance with the federal block grant and the federal Workforce Investment Act," § 2(F), and provides that the $20,364,600.00[1] "appropriation to the instructional material fund is made from the federal [MLLA] receipts." N.M. Laws 2014, Ch. 63, § 4(K). The legislature has made similar notations in previous budgets. *See, e.g.*, N.M. Laws 2008, Ch. 3, at 250 (appropriating $39,020,000.00 to the instructional materials fund from MLLA receipts); N.M. Laws 2009, 124, at 1276 (appropriating $16,230,400.00 to the instructional materials fund from MLLA receipts); *see also* N.M. Laws 2010, 2nd Special Session, Ch. 6, p. 1557; N.M. Laws 2011, Ch. 179, p. 1695; N.M. Laws 2012, Ch. 19, p. 424; N.M. Laws 2013, Ch. 227, p. 2527.

In light of the history of Blaine amendments set forth by the Court in its November 12 opinion, subjecting MLLA funds to Article XII, Section 3, raises significant concerns under the First and Fourteenth Amendments to the United States Constitution. Considering the anti-Catholic, anti-immigrant sentiment that gave rise to the original Blaine amendment, construing Article XII, Section 3, to allow Plaintiff-Petitioners' blatant attempt to "target religious conduct" violates the

[1] The PED provides the final allocation for the 2014-2015 IML allocation as follows: Public schools received instructional materials in the amount of $17,599,183.91; public charter schools, $1,269,449.49; state supported schools, $42,311.30; and private schools, $1,096,21.11. PED, FY 14/15 Final Allocation Table, available at http://www.ped.state.nm.us/ped/IMBdocuments?FY2014-2015%20FINAL%20ALLOCATION%203% 2020%2015%20web%20POST.pdf (last visited April 2, 2015). The allocation for prior years is also available on the PED's website at http://www.ped.state.nm.us/InstructionalMaterial/.

Free Exercise Clause. *See Church of the Lukumi v. City of Hialeah*, 508 U.S. 520, 534 (1993). It also raises Equal Protection concerns by barring a single group (students who attend nonpublic schools, including religious schools) from seeking educational benefits the State gives to other students. *See Romer v. Evans*, 517 U.S. 620, 633 (1996). The Court can avoid these concerns if the MLLA funds are properly recognized as federal funds not subject to state constitutional limitations.

B. Petitioners lack standing to challenge the State's use of MLLA funds.

Plaintiffs do not have standing to challenge the State's use of the MLLA funds to lend instructional materials to students through the IML. Intervenors raised this defense in their answer. **[2 RP 300-02]**

Plaintiffs allege they have standing as taxpayers and as parents of children attending public schools in the State. **[RP 1]** Plaintiffs' taxpayer standing claim fails because the IML is not funded by state tax dollars.

The MLLA does not provide a private cause of action, and thus Plaintiffs do not have statutory standing. *See Cuba Soil & Water Conservation Dist. v. Lewis*, 527 F.3d 1061, 1065 (10th Cir. 2008) (holding the MLLA did not provide a private remedy to challenge the state's use of MLLA funds). Thus, Plaintiffs do not have a remedy under the MLLA regarding expenditures of MLLA funds by the State Legislature.

II. Conclusion.

For the reasons set forth herein and in Intervenors' Answer Brief, the Court should modify its opinion to provide that regardless of Article XII, Section 3 of the New Mexico Constitution, funds appropriated by the Congress through the federal Mineral Lands Leasing Act are not affected. The Court should therefore affirm the Court of Appeals' decision on the alternative ground that the Public Education Department may continue to loan textbooks to students who attend private schools as long as the funds used for that purpose come from the Mineral Lands Leasing Act.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
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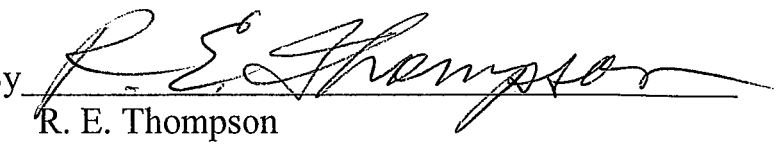
By 

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the following counsel of record on the 24th day of November, 2015:

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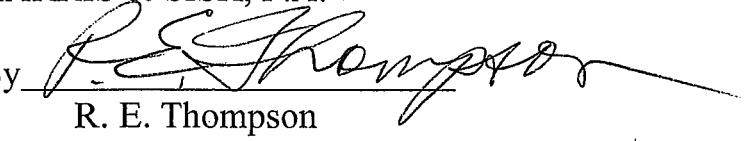
By 
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