Opinion No. 60-59

March 29, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. D. B. Dixon State Highway Engineer State Highway Department Santa Fe, New Mexico

QUESTION

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Is Chapter 310, Laws of 1959, codified as 55-7-23, et seq., N.M.S.A., 1953 Comp. (PS) constitutional insofar as it relates to the reimbursement of utilities relocated due to the construction of highways and more particularly highways designated as a part of the interstate system?

CONCLUSION

No.

OPINION

*{*416}* **ANALYSIS**

Chapter 310 of the Laws of 1959 was enacted by the Twenty-fourth *{*417}* Legislature of the State of New Mexico in an effort to overcome the decision of our Supreme Court in holding a previous relocation statute unconstitutional. This decision, **State Highway Commission v. Southern Union Gas Company,** 65 N.M. 84, 332 P. 2d 1007, in essence, held that the relocation costs of a utility and more particularly a private utility, made necessary because of highway construction were not reimbursable by the Highway Commission or the State of New Mexico for the reason that such reimbursement would violate the provisions of Article IX, Section 14 of the Constitution of the State of New Mexico. The Court specifically stated in its decision that it was not considering the question of repayment of relocation costs of municipally-owned utilities from municipally-owned rights-of-way.

In Sec. 1 of Chapter 310, supra, the legislature sets forth as its declaration of policy that it is in the public interest to provide for the orderly and economical relocation of utilities when made necessary by highway improvements. It further sets forth at some length that because of this public interest, it shall be the policy of the State, in the exercise of its police powers, that such relocations shall be made at the expense of the State and as a part of the highway construction cost.

Very persuasive arguments may be advanced on behalf of the constitutionality of Chapter 310 as enacted by the legislature. However, one must bear in mind the very sweeping language of our Supreme Court in its review of the 1957 Relocation Act and that the only real distinctions between the reimbursement provisions of the 1959 act as compared with the earlier one are in the declarations of policy and its limited applicability.

It is our opinion that the language of our Supreme Court in connection with the 1957 Act is equally applicable to Chapter 310. Firstly, in relation to the statement of policy as enunciated in Sec. 1, attention is directed to the Court's statement found on page 96 of the New Mexico Reports:

"In reply to the appellee's contention that the legislature can change the common law to provide for future payment of utility relocation costs, it is beyond question that the common law is subject to change by statute. That such change may not offend the constitution is equally true. Public policy of this state is determined by the legislature **but such declarations of policy are restricted by the limitations of our constitution.** Flaska v. State, 51 N.M. 13, 177 P. 2d 174." (Emphasis supplied).

Next, in reference to the matter of reimbursement itself, we point to the language of the court as found on page 96 of the New Mexico Reports wherein it reads as follows:

"In conclusion, we would answer the main argument of the appellee that relocation of these utilities is a public governmental function by stating that the construction of highways is unquestionably a public governmental function but that we disagree as to relocation of utility facilities. Highways are constructed by the state on state-owned rights-of-way for the use of the public. The Southern Union Gas Company, in laying its gas lines, is acting solely for the benefit of the utility. The line is the property of the utility and to be used solely by it, neither the state nor the public having any right to use these lines. The Southern Union Gas Company is not a subordinate governmental agency nor is it fulfilling a governmental function although it is serving a highly useful purpose in the great American free enterprise tradition by furnishing for profit an essential commodity to the people of this state."

*{*418}* Again on page 97, the court stated as follows:

"Much has been said concerning the power of the legislature to reimburse the utility on the basis of equity and justice. That the legislature has the power to be equitable and just we may admit, but that power is restricted by the constitution. Otherwise the prohibition against a donation would have no meaning or effect. As stated in State ex rel. Sena v. Trujillo, supra (46 N.M. 361, 129 P. 2d 333), the 'constitution' makes no distinction as between "donations," whether they be for a good cause or a questionable one. It prohibits them all * * *"

In the last analysis, it is our conclusion that the legislation adopted by the 1959 legislature does not overcome the constitutional hurdles set forth by the Supreme Court

in the Southern Union Gas Company case. Therefore, it is our conclusion that the reimbursable provisions of Chapter 310 and particularly Section 4 are unconstitutional.

In view of the severability clause as set forth in Section 9 of Chapter 310, we are of the opinion that the provisions for notice and hearing before such relocations are directed are not affected and thus must be complied with.

By: Thomas O. Olson

First Assistant Attorney General