

## Opinion No. 49-5203

March 30, 1949

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Mrs. Alicia Romero Secretary of State Santa Fe, New Mexico

{\*24} I have your letter of March 25, 1949, in which you state that there is a possibility of an attempted referendum of Chapter 42 of the Laws of 1949, which is an act increasing the tax on gasoline from five cents to seven cents per gallon. You ask the official opinion of this office as to whether or not that law is subject to referendum and as to whether or not you should accept any petitions to {\*25} refer this law to the people, in the event they are presented to you.

The right of referendum is reserved to the people by Section 1 of Article 4 of the New Mexico Constitution. Certain types of laws are exempt from referendum. These are:

"Laws providing for the preservation of the public peace, health or safety; **for the payment of the public debt or interest thereon**, or the creation or funding of the same, except as in this constitution otherwise provided; for the maintenance of the public schools or **state institutions**, and local or special laws."

If Chapter 42 of the Laws of 1949 falls within any of the exempt categories above quoted, it is not subject to referendum and any referendum petitions regarding such a law should not be accepted by you for filing.

Chapter 42 provides an excise tax of 7c per gallon on gasoline to provide the funds necessary to meet the payments of principal and interest on state highway debentures heretofore issued and to provide the funds, after meeting such payments of interest and principal on debentures, for the maintenance, improvement, construction and reconstruction of state highways in New Mexico to match federal aid grants to the state of New Mexico for highway construction work, and to enable the Highway Commission to perform its other duties as required by law. The act then definitely relates to the maintenance of the highway department and is also an act for the payment of highway debentures and interest thereon. To determine whether or not this act is subject to referendum, it is necessary to determine whether or not the highway department is a state institution within the meaning of the Constitution, and whether or not highway debentures are to be considered as a part of the public debt.

Provisions similar to the "state institution" provision of Article 4 of the New Mexico Constitution are found in the constitutions of other states and have been interpreted as including the highway department within the definition of a state or public institution.

By Article 5, Section 1 of the Constitution of Michigan, the people have the right to "approve or reject at the polls any act passed by the Legislature except acts making appropriations for state institutions and to meet deficiencies in state funds."

The above provision was interpreted by the Supreme Court of Michigan in the case of Detroit Automobile Club et al v. DeLand, Secretary of State, 230 Mich. 623, 203 N.W. 529. The particular act in question was a measure providing for a 2c gasoline tax, the proceeds of which were to be used for the payment of interest and principal on state highway bonds with the balance, if any, to be used for the general construction and improvement of the public highways. The Court stated:

"The first question to be determined is whether this is an act making appropriations for a state institution . . . Is the highway department a state institution within the meaning of the constitution?"

The Court stated that even if the State Highway Department could not be correctly termed a state institution, that in view of the functions which it exercised, it came within the meaning of that term as used in the constitution, since the framers of the constitution had in mind that by permitting immediate effect to be given appropriation acts for state institutions, the state could exercise its various functions without financial embarrassment and that the highway department would exercise state functions, and further {26} held:

"That the framers of the constitution used the term 'state institutions' in a broad sense intending to include all organized departments of the state to which the legislature had delegated or should delegate the exercise of state functions."

But the Court went further and specifically held the State Highway Department to be a state institution:

"But it is not necessary to extend the language of the constitution in order to include the highway department within its terms . . .

We are of the opinion that the state highway department is a state institution within the meaning of the constitution and that, therefore, this act which makes appropriations for its use is not subject to the referendum."

The Constitution of Washington reserves the power of referendum to the people "except such laws as may be necessary for the immediate preservation of the public peace, health and safety, support of the state government and its existing public institutions . . ." (Article 2, Section 1B, Constitution of Washington).

This provision was interpreted in State ex rel Blakeslee vs. Clausen, (1915) 85 Wash. 260, 148 P. 28, Ann. Cas. 1916B 810. The Court there stated:

"If our argument be sound it follows that a public institution of the state within the meaning of the 7th amendment is not alone those institutions of a physical character but also all branches and departments created by law and exercising any activity or function defined by the Legislature and existing at the time the amendment was adopted or which, if newly created by the Legislature, have not been rejected by resort to the referendum.

"Upon any theory, a public highway is a public institution. A road is not only a physical institution built by the state in the exercise of its sovereign duty to promote the convenience and necessity of the citizens as well as the common welfare, but the department to which the Legislature has delegated that function is an institution as much so as its creator -- the Legislature."

"It follows that the highway department, the fisheries' department and the state fair are 'public institutions'."

Section 1 of Article 3 of the Constitution of South Dakota reserves the referendum to the people "except such laws as may be necessary for the immediate preservation of the public peace, health and safety, support of the state government and its existing public institutions."

In *State ex rel Shade vs. Coyne*, 58 S.D. 493, 237 N.W. 733, the Court held a law providing for registration and licensing of motor vehicles to be necessary for the support of the state government and its public institutions and, therefore, not subject to referendum.

The court stated:

"That a law for the support of the state highway system is a law for the support of state government and its existing public institutions must be conceded."

Annotation on this subjection appears in 146 A.L.R., commencing at page 297.

While the constitutions of Washington and Maryland speak of "public institutions" rather than "state institutions", the reasoning is the same. The Supreme {27} Court of Maryland in *Winebrenner vs. Salmon* 142 Atl. 723, stated:

"They held, however, that the highways departments were **state institutions** and their reasoning does not distinguish the **institutions of the state** from its **government**. Their reasoning would, we think, have led to the same conclusion if the words 'public institutions' and 'state institutions' had both been parts of the constitutional provisions there under discussion."

The above statement of the Supreme Court of Maryland was made when that court was construing the referendum provisions of the Maryland Constitution which exempts from referendum laws for maintaining or aiding any public institution. From the foregoing

cases, it is the opinion of this office that the highway department of the State of New Mexico is a state institution and that since Chapter 42 of the Laws of 1949 provides for the maintenance of the highway department, said law is not subject to referendum.

The second possible reason for the non-referability of Chapter 42 is that since it relates to the payment of principal and interest on highway debentures, it constitutes a law for the payment of the public debt or interest thereon, and is, therefore, specifically exempt from referendum by Section 1 of Article 4 of the New Mexico Constitution.

Whether or not highway debentures are a "public debt" under the meaning of our Constitution was considered in *State v. Graham*, 32 N.M. 485, 259 P. 623. The court there assumed that they were such a debt for the purposes of its decision, and the question was not decided. However, from the language used by the court, it is felt that this was not merely an idle assumption. On page 492 of the New Mexico Report, we find the following:

"It may be that section 16 was intended to perform the double office of ratifying the particular bond issue authorized by chapter 167, and of establishing a new constitutional policy as to sales of highway debentures in anticipation of the collection of revenues. It is not unreasonable that the people should be willing to relinquish control over anticipatory debentures while retaining control over bonds. The former are short-time obligations to be retired from revenues already assured. **The latter are real and permanent additions to the public debt.** There is an important practical distinction." (Emphasis ours.)

The issuance of highway debentures was authorized by Section 16 of Article 9 of the Constitution of New Mexico, which was added by a 1921 amendment, and which provides as follows:

"Laws enacted by the fifth legislature authorizing the issue and sale of state highway bonds for the purpose of providing funds for the construction and improvement of state highways and to enable the state to meet and secure allotments of federal funds to aid in construction and improvement of roads, and laws so enacted authorizing the issue and sale of state highway debentures to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law for the state road fund, **shall take effect without submitting them to the electors of the state, and notwithstanding that the total indebtedness of the state may thereby temporarily exceed one per centum of the assessed valuation of all the property subject to taxation in the state.** Provided, that the total amount of such state highway bonds payable from proceeds of taxes levied {<sup>28</sup>} on property outstanding at any one time shall not exceed two million dollars. The legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of state highway debentures or which will divert any of such revenues to any other purpose so long as any of the said debentures issued to anticipate the collection thereof remain unpaid." (Emphasis ours.)

In considering the above quoted section, consideration must be given to Section 8 of Article 9 of the Constitution, relating to public debts, which reads:

"No debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof. **No such law shall take effect until it shall have been submitted to the qualified electors of the state and have received a majority of all the votes cast thereon at a general election;** such law shall be published in full in at least one newspaper in each county of the state, if one be published therein, once each week, for four successive weeks next preceding such election. **No debt shall be so created if the total indebtedness of the state, exclusive of the debts of the territory, and the several counties thereof, assumed by the state, would thereby be made to exceed one per centum of the assessed valuation of all the property subject to taxation in the state as shown by the preceding general assessment.**" (Emphasis ours.)

Therefore, generally speaking, no law creating a public debt may become effective until such time as it has been submitted to a vote of the people, and only then if such law does not raise the total indebtedness of the state to more than 1% of the assessed valuation thereof.

It will be noticed that Article 9, Section 16 exempted laws creating highway bonds and debentures from the requirements of electoral ratification and debt limitation of Article 9, Section 8. Article 9, Section 8 only refers to debts contracted by or on behalf of the state, i. e., public debts. If highway debentures were not public debts, there was no reason to exempt them from the requirements relating to such debts. It is evidence that the Legislature and the people considered them to be public debts, else a constitutional amendment would have been unnecessary.

While the Supreme Court of New Mexico has held in several cases that debts payable from a "special fund" are not within the classification of debts contracted by or on behalf of the state, (State v. Regents of U. of N.M., 32 N.M. 428, 258 Pac. 571; Seward v. Bowers, 37 N.M. 385, 24 P.2d 253; and State v. Connelly, 39 N.M. 312, 46 P.2d 1097), this office feels that such cases are not applicable to highway debentures.

In State Office Building Commission v. Trujillo, 46 N.M. 29, 120 P.2d 434, the court, after reviewing the previous decisions, stated:

"We have thus dwelt upon our decisions to show that so far as we have adhered to the special fund doctrine, it may be said for the purpose of this discussion that **it means that thereby and thereunder any financial obligation of the state, not otherwise constitutionally objectionable, is {\*29} valid without approval of the electorate if it is to be paid for and discharged in full from moneys derived from sources other than from general taxation, as contemplated under Section 8 of Article IX of the State Constitution; and to show that for such an obligation to come under the special**

**fund doctrine, the creation of the obligation and the law authorizing it must specify and set out the sources for payment thereof and thereby disclose that no part of the payment is to be obtained from general taxation."** (Emphasis ours.)

If then, part of the payment of such debentures may come from general taxation, they will not be considered as coming under the "special fund" doctrine.

Article 9, Section 16 authorizes laws permitting the sale of debentures "to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law or the State Road Fund.", and further provides that no law shall be passed decreasing the amount of the annual revenues pledged for the payment of such debentures.

Section 58-243 of the 1941 Compilation, originally passed in 1917, and amended to its present form in 1919, levies a 1 1/2 mill tax on all taxable property in the state to be covered into the State Road Fund, to be used as follows:

"Subject to the provisions of section 4579, New Mexico Statutes, Codification of 1915, after providing for interest and sinking fund upon state highway bonds authorized and issued in accordance with chapter 58 of the Session Laws of 1912 by setting aside sufficient funds therefor each year out of the proceeds of the said one (1) mill tax levy or out of moneys received from sales of certificates or debentures issued in anticipation thereof, **it shall be the duty of the state treasurer to set aside from the moneys received from collection of the taxes and licenses pledged therefor sufficient funds to provide for the payment of the interest and principal of all certificates or debentures issued under the provisions of this act.**" (Emphasis ours.)

The annual **general property** tax levied by this act, goes into the State Road Fund, and is therefore a part of the revenue pledged to the payment of the debentures, not only by Section 58-243, but by Article 9, Section 16 of the Constitution.

Section 58-244 of the 1941 Compilation, both as originally enacted and as amended, recognizes this fact, and authorizes the state highway commission "to anticipate the proceeds of the collection of any or all of the gasoline excise taxes, motor vehicle registration fees, and **property** and other **taxes**" to the extent the same are covered into the State Road Fund, and are not otherwise pledged.

The act in question provides for the payment of these debentures, and since we feel such debentures are a part of the public debt, we do not believe that this act is subject to referendum.

Since the act is not subject to referendum for the reasons hereinabove stated, it is the opinion of this office that upon the authority of State ex rel Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192, you should refuse to file petitions for the referendum of Chapter 42, Laws of 1949, in the event they are presented to you for filing.