

Opinion No. 67-56

April 6, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Hadley Kelsey Special Assistant Attorney General Legal Section State Highway Commission Santa Fe, New Mexico

QUESTION

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Under Sections 55-7-23 through 55-7-29, N.M.S.A., 1953 Compilation, must the State of New Mexico pay certain relocation costs for all federal aid highways enumerated under the 1956 Federal Aid Highway Act, as amended?

CONCLUSION

See analysis.

OPINION

{*78} ANALYSIS

Under the terms of the above New Mexico Statutes the State of New Mexico may pay certain relocation costs only as provided by Section 55-7-26(A)(1) and (2), which provide as follows:

STATE PAYS CERTAIN RELOCATION COSTS. -- A. In the following types of utility relocation ordered by the commission pursuant to section 3 A [55-7-25] it shall either, as it elects, undertake the relocation work on behalf of the state, paying the cost of relocation, or reimburse the utility for the cost of relocation:

- (1) Relocations necessitated by improvements of public highways in the interstate system, including extensions thereof within urban areas; and
- (2) Relocations by complete removal and construction of facilities off the public highway.

Unless reimbursement can be made to utilities under one of these two situations no reimbursement may be made by the State of New Mexico.

In determining the application of subsection 1 of 55-7-26A it is necessary that we define the term "interstate system" as it is used therein. We are aided in this by referring to Section 55-7-26D which limits costs of relocation necessitated by improvement in the interstate system to those which are available for proportionate reimbursement under

the 1956 Federal Aid Highway Act as amended. In referring to the 1956 Federal Aid Highway Act as amended we see that under 23 U.S.C.A. Section 103 there are three types of federal aid systems which are designated as an interstate system, a primary federal aid system, and a secondary federal aid system. This is the same delineation of federal aid highways which is defined under Sections 55-7-24F N.M.S.A., 1953 Compilation. Therefore, we are of the opinion that subsection 1 of 55-7-26A refers only to relocations necessitated by improvements of public highways in the interstate system as defined in the 1956 Federal Aid Highway Act as amended. Therefore, relocations of utilities necessitated by improvements of public highways in the federal aid primary system, or the federal aid secondary system as defined by the 1956 Federal Aid Highway Act, as amended, are not proper subjects for reimbursement under Section 55-7-26A 1.

We are of the opinion that under subsection 2 of 55-7-26A the State of New Mexico must pay costs of relocations caused by **complete removal and construction of facilities of utilities off the public highway** in all situations. We arrive at this conclusion by referring to Section 55-7-24D, supra, which defines the term "public highway" as follows:

{*79} D. The term "public highway" shall mean and include any state highway **or other public way in this state**, including extensions thereof within urban areas, **constructed in whole or in part with state aid**, and shall include any incorporated or related physical facilities for the handling of traffic and the right of way. (emphasis supplied)

Therefore, in the situation where the State Highway Commission orders the public utility **to remove their facilities completely off the public right-of-way** the State of New Mexico must either undertake the relocation work or pay the cost of relocation or reimburse the utility regardless of whether the public highway from which the utility is removed is a highway in the interstate system, the federal aid primary system, or the federal aid secondary system.

It has been suggested that the following quotation from the case of **State v. Lavender**, 69 N.M. 220, 227, 365 P.2d 652 (1961), would operate to prevent the State Highway Commission from paying the cost of relocation on any but interstate and defense highway systems:

Also, as an additional distinction between the 1967 and the 1959 Acts, the provisions of the 1959 Act apply only to cases involving the construction of interstate and defense system highways, rather than on all federal-aid highways. **This distinction is of considerable importance when it is realized that these particular highways are designed primarily for the nation as a whole, not merely for a community or for the state of New Mexico.** [at] 227. (emphasis supplied)

We construe the last sentence of the above quotation from the case of **State v. Lavender**, supra, to constitute obiter dicta inasmuch as the case there was concerned only with the cost of relocations necessitated by improvements to highways in the

interstate system. We are also of the opinion that the last sentence in the above quote is obiter dicta because further reasoning in the case of **State v. Lavender**, supra, would permit payment for the costs of relocation of utilities necessitated by improvements to other federal aid highways than those in the interstate system. The following quotation from **State v. Lavender**, at page 233 of the New Mexico Reporter is evidence of this:

The statement in Southern Union, that New Mexico has never recognized that one of the primary purposes for which highways are designed is for location of utility facilities, was made in order to distinguish the leading contrary case, Minneapolis Gas Company v. Zimmerman, 1958, 253 Minn. 164, 91 N.W. 2d 642. **Actually, this statement is erroneous when it is considered that there has been unquestioned statutory authority for such use of highway rights-of-way for more than fifty years.** (Emphasis supplied)

And at page 234 of the New Mexico Reporter we see this reasoning:

We approve a proper balancing of the benefits to be obtained by the exercise of the state's police power in requiring the relocations of utilities at the sole expense of the owners thereof, as opposed to the burdens, fully justifies the expenditure of public monies for the purpose of doing equity.

Therefore, we are of the opinion that under subsection 1 of 55-7-26A all relocations necessitated by improvements of public highways in the interstate system as defined by the 1956 Federal Highway Act as amended must be reimbursed by the State of New Mexico, provided, of course, that the relocations do not fall within any of the exceptions {80} listed under 55-7-26B. We are also of the opinion that under subsection 2 of 55-7-26A relocations of public utilities which cause them to be completely removed from the public highway must be reimbursed by the State of New Mexico regardless of whether the public highway is a part of the interstate system, the federal aid primary highway system or the federal aid secondary highway system, again provided that the relocation does not fall within one of the exceptions enumerated under Section 55-7-26B.

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