Opinion No. 70-13

February 3, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Richard H. Folmar Assistant Director New Mexico Legislative Council 334 State Capitol Santa Fe, N.M. 87501

QUESTIONS

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1. Can the Legislature submit to the people for their approval a proposed constitutional amendment that would repeal Section 5 of Article XIX?

2. If such proposed constitutional amendment were adopted what would be the effect upon non-convention submitted amendments to Section 1, Article XIX?

CONCLUSIONS

1. Yes.

2. See analysis.

OPINION

*{*21}* **ANALYSIS**

Section 1 of Article XIX of the New Mexico Constitution contains the provisions for the proposal of constitutional amendments by the State Legislature and their ratification by the people. Over the years some dissatisfaction with these amending procedures has been expressed. Report of the Constitutional Revision Comm'n 194 (1967). See also, **City of Raton v. Sproule,** 78 N.M. 138, 429 P.2d 336 (1967).

Some of the difficulty of working with Article XIX, Section 1, is compounded by the fact that Section 5 of Article XIX prevents the amendment of Section 1 of Article XIX by other than a constitutional convention. Section 5 provides as follows:

"The provisions of section one of this article shall not be changed, *{*22}* altered, or abrogated in any manner except through a general convention called to revise this Constitution as herein provided."

The repeal of Section 5 has therefore been suggested by many as a solution to the problem of amending the New Mexico Constitution. See, Report of the Constitutional

Revision Comm'n 196 (1967). See also, Note, **Procedural Problems in Amending New Mexico's Constitution,** 4 Natural Resources J. 151 (1964).

The entire Article XIX of the New Mexico Constitution was adopted in its present form by the voters at the general election of November 7, 1911, prior to the admission of New Mexico to statehood. Although an Article XIX, the article on amendments, had been previously adopted by the voters on January 21, 1911, the United States Congress required a second vote on Article XIX as amended by the Congress itself. See, Joint Congressional Resolution of August 21, 1911, 37 Stat. 39 (1911). Because an amended Article XIX was submitted to the voters under the compulsion of the Congressional Joint Resolution, there has always been considerable confusion as to the power of the state to amend Article XIX. See e.g., Note, **Procedural Problems in Amending New Mexico's Constitution,** 4 Natural Resources J. 151, 156-59 (1964). See also, the compiler's notes to Article XIX, Section 1 found at page 246 of the N.M.S.A., 1953, Vol. 1.

It is our conclusion that Section 5 of Article XIX may be amended or repealed by submitting the question to the voters in accordance with Article XIX, Section 1. We reach this conclusion for the following reasons:

A. The Congressional Joint Resolution of August 21, 1911 does not legally bind the State to Congressional approval of amendments to Article XIX.

B. Even if the Congressional Joint Resolution had some special legal status, the Resolution did not require the adoption of Article XIX as amended, as a prerequisite to admission to statehood.

C. Even if it could be argued that Congress required the adoption of Article XIX as a prerequisite to admission to statehood, Congress only proposed changes to Sections 1 and 2 of Article XIX and none other.

There is little doubt that the Enabling Act for New Mexico, the congressional enactment enabling the Territory of New Mexico to proceed towards statehood, has a special legal and constitutional status restricting the state's freedom of action with regard to constitutional change. See generally, Bingaman, **Constitutional Convention Comments,** N.M. B. Bull., Vol. 8, p. 59 (1969); Note, **Procedural Problems in amending New Mexico's Constitution,** 4 Natural Resources J. 151, 157 (1964). But, simply put, there appears to be no authority that the Congressional Joint Resolution has any particular legal effect. In fact, the State of Arizona, which was instructed to make certain constitutional changes in the Joint Resolution of August 21, 1911, proceeded to amend its constitution after statehood to re-enact the very provisions Congress had so vigorously opposed. See, Note, **Procedural Problems in Amending New Mexico's Constitution,** 4 Natural Resources J. 151, 158-59 (1964). Even if the courts might find that we are wrong in our characterization of the legal effect of a Congressional Joint Resolution, we find that this particular Joint Resolution made no effort to lock-in any particular constitutional provisions as a prerequisite to statehood. Furthermore, any

amendments to the Article proposed in the Resolution could not endanger our present status as a State in the Union. It is generally supposed that the Congressional Joint Resolution required the adoption of Article XIX, as amended, as a prerequisite to statehood. A close analysis of the resolution does not support this generally accepted conclusion. In Section 3 of the Resolution it is provided that "the electors of New Mexico shall vote upon the following proposed amendment of their state constitution as a condition precedent to the admission of said State . . ." (Emphasis added). It is clear that Section 3 of the Resolution only required that a vote should be taken upon the amendment, and not that the amendment be adopted.

*{*23}* In Section 5 of the Joint Resolution, Congress provided for the procedure and method of canvassing the special election on the amendment. That section provides that:

"If a majority of the legal votes cast at said election upon said amendment shall be in favor thereof, the said canvassing board shall forthwith certify said result to the governor of the Territory . . . whereupon the governor of said Territory shall by proclamation declare the said amendment a part of the constitution of the proposed State of New Mexico . . . but if the same shall fail of such majority, than Article XIX of the constitution of New Mexico as adopted on January twenty-first, nineteen hundred and eleven, shall remain a part of said constitution."

It seems absolutely clear that Congress not only did not require the adoption of any amendments to the New Mexico Constitution as a prerequisite to admission to statehood, but provided that if the amendments did not pass that the Constitution as originally enacted by the Territorial voters would remain intact.

Finally, under your question No. 1, if we are incorrect under our first two subpoints, we believe that it is clear than Section 5 of Article XIX was not changed in any respect by the amendment proposed by the Congressional Joint Resolution. In examining the Congressional debates on the Joint Resolution of August 21, 1911, we find scarce mention of Section 5 of Article XIX. Senator Reed of Missouri expressed his opposition to Article XIX, Section 5 only insofar as it related to Article XIX, Section 2, the provision providing for constitutional conventions. Senator Reed noted that:

"First, they make it almost impossible to call a convention at all; then they make it almost impossible to ratify the act of the convention; then they provide that certain portions of this constitution can only be submitted in that way. The hand that penned that instrument was the hand of a man who would have made an ideal minister for George III of England. It does not belong to a man who lives in the twentieth century and believes in American principles of government; either that, or it was guided by those selfish interests which distrust and despise the people."

47 Cong. Rec. 4133 (1911).

By simply comparing Article XIX, Section 5 as it was incorporated into the Constitutional Convention document of 1910 and adopted by the Territorial voters on January 21, 1911, with Article XIX, Section 5 as proposed in the Joint Resolution of Congress and adopted by the voters of New Mexico, one can quickly ascertain that no changes were made in this particular section. Compare, Proceedings of the Constitutional Convention of the Proposed State of New Mexico 246-47 (1910), with, 37 Stat. 40-41 (1911). If Congress required no changes in Article XIX, Section 5, we could see no legal or constitutional prohibition against its amendment or repeal on either the initiative of the Legislature or a constitutional convention.

In answer to your second question, it appears that, if Article XIX, Section 5 is repealed, then amendments to Article XIX, Section 1 may be submitted to the voters on the initiative of the Legislature. Of course, such amendments to Article XIX, Section 1 would have to be submitted in accordance with the requirements of Article XIX, Section 1. Therefore, if Section 5 were repealed, we can see no legal basis for concluding that a non-convention amendment to Article XIX, Section 1 would have any less than full constitutional validity, and if adopted by a vote of the people, the courts would grant a strong presumption in favor of its validity. See **City of Raton v. Sproule, supra,** 78 N.M. at 142. But see, Opinion of the Attorney General No. 69-151, dated December 29, 1969, which questions the validity of amendments proposed at the "even year" legislative sessions.

By: Mark B. Thompson, III

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