

Opinion No. 71-23

February 16, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable C. Gene Samberson New Mexico State Representative Legislative-Executive Building Santa Fe, N.M. 87501

QUESTIONS

QUESTION

Would the proposed legislation contained in House Bill 82, if enacted, be unconstitutional?

CONCLUSION

Yes.

OPINION

{*37} ANALYSIS

House Bill 82 proposes the following new Section 75-13-25:

"75-13-25. CARRIAGE LOSS ALLOWANCE ESTABLISHED. -- In addition to the duty of water for irrigation within any artesian conservancy district established under the provisions of Sections 75-13-1 through 75-13-24 NMSA 1953, there shall be permitted an additional two acre inches of water per year per acre foot of an established water right to compensate for carriage loss between the point of appropriation and the point of beneficial use."

It is the opinion of this office that the above-quoted legislation would be unconstitutional on several grounds.

(1) **Special Legislation**

New Mexico Constitution, Article IV, Section 24, forbids the passage of local or special laws. The portion of that article which is applicable here reads: "In every other case where a general law can be made applicable, no special law shall be enacted."

General and special legislation were defined in **City of Raton v. Sproule**, 78 N.M. 138, 429 P.2d 336 (1967), as follows:

"A statute relating to persons or things as a class is a general law. A special statute, on the other hand, is one that relates to particular persons or things of a class, or is made for individual cases, or for less than a class of persons or things requiring laws appropriate to its peculiar condition and circumstances. *State v. Atchison T.&S.F. Ry.*, 20 N.M. 562, 151 P. 305 (1915); *Scarborough v. Wooten*, 23 N.M. 616, 170 P. 743 (1918). If a statute is general in its application to a particular class of persons or things and to all of the class within like circumstances, it is a general law. *Albuquerque Met. Arroyo Flood Con. A. v. Swinburne*, 74 N.M. 487, 394 P.2d 998 (1964); *Davy v. McNeill*, supra." 78 N.M. at 152.

The proposed statute purports to grant a carriage loss allowance to established water rights "within any artesian conservancy district." First, we note that the only such districts now existing are the Pecos Valley Artesian Conservancy District and the Upper Rio Felix Artesian Conservancy District. This in itself makes the legislation have application only to a fairly narrow special group, but probably would not require that the statute be held unconstitutional if artesian conservancy districts made up a meaningful "class" with regard to carriage loss. But, they do not.

{*38} Every person who uses water for irrigation purposes faces the problem of carriage loss, no matter whether his water is derived from artesian sources, from surface water, or from non-artesian underground sources. Therefore, to provide legislatively for carriage loss only to those with water rights within artesian conservancy districts discriminates unconstitutionally against those with water rights in areas outside of artesian districts. This is precisely the type of legislation which New Mexico Constitution, Article IV, Section 24, was designed to prevent. This bill, if passed, would be unconstitutional.

(2) Separation of Powers

New Mexico Constitution, Article III, Section 1, reads as follows:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted."

The strength of the application of the separation doctrine in New Mexico is evidenced by such cases as **Fellows v. Shultz**, 81 N.M. 496, 469 P.2d 141 (1970); **Continental Oil Co. v. Oil Conservation Comm'n**, 70 N.M. 310, 373 P.2d 809 (1962); and **State ex rel Hovey Concrete Products Co. v. Mechem**, 63 N.M. 250, 316 P.2d 1069 (1957).

First, it must be admitted that House Bill 82 attempts to grant a water right of two acre inches per acre foot to those holding water rights in the artesian basins.

Secondly, our New Mexico statutes place exclusive jurisdiction over the adjudication of water rights in the courts. Section 75-4-6, N.M.S.A., 1953 Comp. See **State v. Sharp**, 66 N.M. 192, 344 P.2d 943 (1959); and **El Paso R.I. Ry. Co. v. District Court**, 36 N.M. 94, 8 P.2d 1064 (1931).

Where exclusive jurisdiction has been given to the judiciary to determine water rights, it is the opinion of this office that the separation of powers doctrine forbids the Legislature from granting any such rights. Therefore, the grant of water rights contained in House Bill 82 is unconstitutional.

(3) **Miscellaneous**

Although we are not prepared to declare that this proposed legislation would be unconstitutional on the grounds discussed below, we feel there is a significant constitutional problem in each area.

(A) **Equal Protection** -- In the federal sense, we feel there is an equal protection problem with the bill. This is related to the classification problem discussed above in that the bill provides for a distinction within a class, and without a rational basis for such distinction. Since there is "state action" inherent in the bill, the Fourteenth Amendment might require that the bill be considered to be unconstitutional as a denial of equal protection to those who should have been, but were not, included in the class.

(B) **Due Process** -- Where statutes provide for judicial determination of water rights, there is a possibility that a legislative act enlarging the water rights of one group might be treated as a taking of property of another group without due process of law. For example, the withdrawal of more water from the already fully appropriated Pecos Valley Artesian Conservancy District could adversely affect the existing water rights in the Carlsbad area, thus effecting a taking of a property right to water in the Carlsbad area without compensation or a chance for those persons so affected to be heard.

Both federal and state due process problems would appear to be involved; the federal because of the "state action" through the statute, and state under the prohibition in New Mexico Constitution, Article II, Section 18, which states:

"No person shall be deprived of life, liberty or property without due process of law; . . ."

By: C. Emery Cuddy, Jr.

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