

## Opinion No. 51-5438

October 4, 1951

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

**TO:** Hon. Edwin L. Mechem Governor, State of New Mexico Santa Fe, New Mexico

{\*144} This is in reply to your letter of September 25, 1951, in which you requested an opinion as to whether the limitation imposed by § 66-603; as amended, N.M.S.A., on the issuance of certificates of indebtedness by the Governor is in conflict with Art. 5, Sec. 4, and Art. 9, Sec. 7, of the State Constitution. You also ask, concerning Art. 9, Sec. 7, whether the authority to borrow not in excess of \$ 200,000 applies to debts contracted to suppress insurrection and to provide for the public defense.

In my opinion, the limitation imposed by § 66-603, as amended, is not in conflict with Art. 5, Sec. 4, and Art. 9, Sec. 7, of the Constitution. However, it is necessary to examine these constitutional provisions and § 66-603 to determine the meaning and portent of this statute.

It is clear that Art. 5, Sec. 4, of the Constitution vests in the Governor the authority to call out the militia "to preserve the peace, execute the laws, suppress insurrection, and repel invasion." In *State ex rel Charlton v. French*, 44 N.M. 169, the Court said:

"When acting within the power vested in him the Governor may order into active service the militia and direct into what locality they shall go or operate. He is made the sole judge of the facts that seem to demand the aid and assistance of the military forces of the State . . . To his good judgment and sound discretion, the law has left the final decision as to whether the military arm of the State shall be ordered into active service."

Therefore, § 66-603 cannot, and does not, mean that if it is necessary to spend in excess of \$ 75,000 to complete the mission for which the militia was called, the Legislature can override the Governor in determining what portion of the militia should have been called and how much money it will be, or was, necessary to spend. In considering a similar question, our Supreme Court said in *Charlton v. French*, supra:

"If there is a latent fear that some chief executive, under the powers granted him, may build a Maginot line along the south border of New Mexico and thus plunge the State of New Mexico hopelessly in debt, then the solution is a repeal of the authority vested in the Governor. That is for the Legislature and not the Court."

Obviously, the authority vesting in the Governor by virtue of Art. 5, Sec. 4, has not been repealed. Therefore, any attempt by the Legislature to invade that authority would be interference by one department of the government with {\*145} another, contrary to Art. 3 of our Constitution.

Art. 9, Sec. 7, of the Constitution gives the State authority to contract debts to suppress insurrection and to provide for public defense. It does not specifically give the Governor the right to order the issuance of a certificate of indebtedness to cover the total debt, nor does it specifically state the form in which those debts or obligations shall be met. Therefore, in my opinion, it is within the Legislature's power to provide by statute that all expenses in excess of \$ 75,000, incidental to the calling out of the militia by the Governor, shall be met by the issuance of debentures. This the Legislature has done in the enactment of § 66-603, as amended. But the Legislature must issue those debentures, and, as I have stated above, may not review the efficacy of the Governor's action in calling out the militia and incurring expenses. In this connection, it should be noted that the statute itself contemplates that all determinations regarding the necessity of calling the militia and the necessity of incurring expenses in excess of \$ 75,000 shall be had by the "Governor's inquiry".

To summarize, it is my opinion that § 66-603, as amended, does not interfere with the Governor's power to call out the militia and does not therefore conflict with Art. 5, Sec. 4. I likewise consider it inconceivable that there could be a delay in assembling the Legislature in special session which would impair this constitutional power of the Governor. It is further my opinion that § 66-603, as amended, is in perfect accord with Art. 9, Sec. 7. To say that this statute is a useless act, inasmuch as the State would in any event be obligated to pay debts incurred by a mobilization of the militia, is no argument against the right of the Legislature to provide that certain of its obligations shall be met by the issuance of debentures.

Your other question concerned an interpretation of the meaning of Art. 9, Sec. 7, of the Constitution.

This section reads as follows:

"The State may borrow money not exceeding the sum of \$ 200,000 in the aggregate to meet casual deficits or failure in revenue, or for necessary expenses. The State may also contract debts to suppress insurrection and to provide for the public defense."

It is my opinion that the \$ 200,000 limitation on the State's borrowing to meet "casual deficits or failure in revenue, or for necessary expenses" does not apply to debts contracted to suppress insurrection or to provide for the public defense. Firstly, I believe that the plain and ordinary meaning of the words and the order in which they appear in this section support this interpretation. Secondly, there is further support for this interpretation on the basis of public policy. In addition, I have examined similar provisions in the constitutions of Arizona, Colorado, Oklahoma, Texas and Utah. The constitutions of the last four of these states were adopted before the New Mexico Constitution, and it is interesting to note that all of them provide explicitly that the limitations on borrowing shall not apply to debts contracted to suppress insurrection and provide for the public defense. These facts do not, of course, constitute a conclusive argument as to the meaning of our Art. 9, Sec. 7. It is my opinion, however, that since these previous constitutional enactments were available to the makers of our

Constitution for reference, they are of further assistance in determining the import of the language of Art. 9, Sec. 7.

Trusting that this opinion answers fully all your questions on this subject, I remain