Opinion No. 57-62

March 26, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Santiago E. Campos, Assistant Attorney General

TO: Honoragle Edwin L. Mechem, Governor of New Mexico, Santa Fe, New Mexico

QUESTIONS

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1. Is it constitutional to use State funds to pay $ 2.50 per ton toward the price of hay in the Cooperative Emergency Roughage Program?

2. How can an action be started to get a final speedy Court determination?

CONCLUSIONS

1. No.

2. We suggest that you, as Governor, institute a mandamus action against the Auditor and the Director to compel performance.

OPINION

ANALYSIS

On September 13, 1956, our Governor, acting for the State of New Mexico, and the Acting Secretary of Agriculture, acting for the United States, entered into an agreement called the "Federal-State Cooperative Agreement for Roughage Program in the State of New Mexico."

Substantially, the agreement provides for the creation of a fund for the purpose of extending assistance to ranchers and farmers in the purchase of "roughage" -- feed for livestock. Seventy-five percent of the moneys in the fund are to be contributed by the Federal Government and 25% by this State.

The original agreement called for a contribution from the United States of an amount not to exceed $ 225,000.00, and the share of the State was set at $ 75,000.00. An amendment to the agreement on October 3, 1956, changed the amount of the U.S. Government's contribution from $ 225,000.00 to $ 1,225,000.00, but is silent as to the change, if any, to be made in the State's contribution. However, by letter of the same date, the Governor indicated to Mr. H. M. Rickman, Chairman of the State Drouth Committee, that the Committee could be assured that the State of New Mexico would

make necessary funds available to meet New Mexico's obligations as the obligations arose and were needed, regardless of the amount.

From this fund, eligible farmers and ranchers are granted, as an outright grant, the sum of $ 10.00 per ton of roughage purchased.

The Federal Government, through the county committees of the Farmers Home Administration, determines eligibility for participation in the program and the State has no control over this determination whatsoever.

Eligibility under the agreement is determined as follows:

"'Eligible livestock' are the number and kind of livestock owned by an eligible applicant as provided in regulations issued by the Farmers Home Administration. Generally, roughage with respect to which reimbursement may be claimed will be made available only for the owner's minimum feeding requirements for the period set forth in an approved application for assistance with respect to his foundation or basic herd of sheep, goats for mohair, beef cattle or dairy cows."

A certificate is issued the eligible applicant indicating the number of tons of roughage which has been approved for purchase and authorizing the payment from the fund of $ 10.00 per ton approved. The certificate is presented to the roughage dealer and credit on the purchase is extended in that amount. The dealer then presents the certificate through a local bank or directly to the First National Bank of Santa Fe, the State depository, and upon voucher and warrant transfers are made from the fund.

Other than certification and determination of eligibility, the State is responsible for the costs of administration of the program.

The issuance of certificates was stopped on January 29, 1957. It is estimated that from the date of inception of the program through January 29, 1957, the purchase of 321,009 tons of roughage was authorized under the program. The major portion of these certificates are now outstanding and have not been paid.

This means that the program has obligated payment in the approximate amount of $ 3,210,090.00, not including administrative costs. The State's share of the cost of the program is thus approximately $ 802,000.00 plus costs of administration. It is to take care of this obligation that the 1957 Legislature passed Senate Bill No. 180, which you have signed recently. Senate Bill No. 180 appropriates from the State General Fund the sum of $ 200,000.00 for use under the program in the 45th and 46th fiscal years. It also appropriates $ 35,000.00 for the administration of the program. And further, it provides that in the event it becomes necessary to spend more than the $ 200,000.00 appropriated, the State Board of Finance is authorized to issue certificates of casual indebtedness up to the amount of $ 443,000.00.

The above, briefly, are the circumstances surrounding the roughage program.

Now, for the purpose of this opinion and for the reasons hereafter stated, we will treat the program, as one where the complete administration of the program, including the determination of eligibility for assistance, is in the State. Further, we will treat it as if the Legislature, and not the Governor and the Acting Secretary of Agriculture, had by law devised it and had prescribed the manner of its operation. In short, that which is authorized by the agreement will be treated as having been authorized by a law passed by the Legislature.

Now to your question, firstly, Article IX, § 14 of the New Mexico Constitution provides:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

And Article IV, § 31 of the New Mexico Constitution provides:

"No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion, make appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the legislative assembly of nineteen hundred and nine."

Research does not disclose any cases in this jurisdiction passing upon the validity of an assistance plan similar to the roughage program. However, courts of other jurisdictions have tested the constitutionality of plans with similar aims as those of our roughage program against provisions where the language of their constitutions was either very similar to or identical with that in our Article IX, § 14 and Article IV, § 31. But whether the assistance plans examined in these cases have been upheld or have been found invalid, there is not, in our opinion, one which can sustain the validity of our program, for although the purpose of the plans considered in these cases are in a general sense similar to that of our program, yet there is a very basic and important difference between them. We keep in mind that eligibility for assistance under our program is based upon the provision of the agreement under paragraph 3-c, quoted above. Under this standard, aid is apparently available regardless of financial status or economic condition of applicant.

Firstly, the cases which uphold farmer aid programs. These arose in connection with seed-grain plans. The principal and most often cited as authority for the validity of such plans **is State vs. Nelson County,** (N.D.), 45 N.W. 33 (1890). In this, legislation authorized counties to sell bonds and use the proceeds to purchase seed-grain and make this available, subject to repayment, to:

". . . residents of the county who are poor and unable to procure the same; . . ."

The Constitution of North Dakota provided that:

"Neither the state, nor any county, city, township, town, school-district, or any other political subdivision, shall loan or give its credit, or make donations to or in aid of any individual, association, or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in work of internal improvement, unless authorized by a two-thirds vote of the people."

Departing from the theory advanced in other cases, notably **State v. Osawkee,** 14 Kans. 424, 19 Am R. 99 (1875), hereafter discussed, the North Dakota Court held that "necessary support of the poor" encompassed support not only to those who were public charges -- paupers -- but also of

". . . those whose condition is so impoverished and desperate as to reasonably justify the fear that, unless they receive help, they and their families will become a charge upon the counties in which they live."

reasoning that

". . . Under the stress of adversity peculiar to the condition of the frontier farmer, there has come to be an expansion of the legal meaning of the term 'poor' sufficient to embrace a class of destitute citizens who have not yet become a public charge . . . ."

In **State v. Weinrich, (Mont.),** 170 P. 942 (1918), the Supreme Court of Montana upheld the validity of a seed-grain program similar to that considered in the Nelson County case. Seed-grain was to be made available to:

". . . . inhabitants of the county who are in need of seed-grain and are unable to procure the same, . . ."

Montana had constitutional provisions similar to our Article IX, § 14 and Article IV, § 31. The "sick and indigent" clause in our Article IX, § 14, did not appear in the Montana provision prohibiting aid or donations to private persons, but another provision in the Montana Constitution provided that:

"The several counties of the state shall provide, as may be prescribed by law, for those inhabitants, who, by reason of age, infirmity or other misfortune, may have claims upon the sympathy and aid of society."

The Montana Court, as the North Dakota Court, held that under its Constitution aid was not limited to paupers but could be extended to a class who although not paupers were in danger of becoming such should aid not be provided.

"If, therefore, the phrase 'needy farmers who are unable to procure seed' may be taken to mean persons engaged in agriculture who, by natural or other conditions beyond their control, are so reduced in circumstances that they have neither money, nor credit, nor property in shape to be pledged or mortgaged, and who without some aid will become paupers, dependent on the county for support -- and we think this is the meaning -- then the purpose to aid them is a public one, and the only subject left to consider is the validity of the means prescribed."

and the act was

". . . vindicated only as, a measure of relief to those 'who by reason of misfortune have claims upon the aid of society,' . . ."

Montana's constitutional provision, which is almost identical with our Article IV, § 31, was deemed not a prohibition to aid under the seed-grain law since no appropriation by the Legislature was involved.

Although three Justices dissented, **Cobb v. Parnell,** (Ark.), 36 S. W. 2d 338 (1931), decided substantially as the cases above.

These, as far as we can find, are the cases which support farmers assistance plans similar to our roughage program. But analysis of these cases indicates that although their constitutional provisions were appraised as permitting aid to other than paupers, still some showing was necessary that those to be helped must be suffering from such a degree of financial or economic hardship that if aid were not extended these would become paupers.

The following cases held farmer aid programs unconstitutional:

In **State v. Osawkee,** supra, a seed-grain law similar to that dealt with in **State v. Nelson County,** supra, was examined and held unconstitutional. The Kansas Court reasoned that under their Constitution aid could be extended only to those who were public charges or paupers.

In **Deering & Co. v. Peterson,** (Minn.), 77 N.W. 568 (1898), the Court examined their seed-grain statute against the provisions of their Constitution, which, among other things, provided that:

"The credit of the state shall never be given or loaned in aid of any individual or corporation."

and concluded that the statute was unconstitutional. In so doing, it recognized the validity of the test stated in **State v. Nelson County,** supra, and concluded that possibly aid might be extended to those who were not paupers but in danger of becoming such. However, since the statute did not confine its benefits to those who did meet the broader standard announced in **State v. Nelson County,** it was held unconstitutional.

In Re Opinion of the Judges, (S.D.), 240 N.W. 600 (1932), it was held that proposed legislation appropriation moneys for feed loans would be unconstitutional.

And in **In Re Relief Bills,** (Colo.), 39 P. 1089, a drought relief program was considered and it was held that proposed legislation was unconstitutional as contravending Article V, § 34 of the Colorado Constitution, which is almost identical to our Article IV, § 31.

We conclude from the above cases that since assistance under the Emergency Roughage Program is not limited to paupers or even to those who although are not paupers are in danger of becoming such and thus unable to come within the most liberal interpretation of the "sick and indigent persons" exception of Article IX, § 14 of our Constitution, this provision, as well as Article IV, § 31, prohibits the State's contribution of $ 2.50 per ton toward the purchase of hay. However, in view of the great hardship which will be entailed by this decision, it is suggested that in order to remove all doubts that action be initiated to determine the legality of the above in the Courts of this State.

We suggest that the most expedient way to get a determination in this State from the Supreme Court is for you, as Governor, to file an action in mandamus against the Auditor, requiring him to transfer the funds appropriated by the 1957 Legislature, and the Director of the hay program to expend the same, as an original action in the Supreme Court. This office, of course, will cooperate in a hasty and expeditious decision on this matter.

Further, as mentioned above, and for the purpose of this opinion, we have treated the provisions of the agreement as if they were provisions of law. But questions arise concerning the power of the executive to contract for the expenditures of the moneys of this State in this fashion. And further question arises as to whether the Legislature may, after the executive has obligated the State for more than the moneys available, pass a measure appropriating moneys to pay for these obligations over which the Legislature exercised no control whatsoever at the time of their creation. These we do not undertake to examine in view of the position taken on the validity of the expenditures examined against the provisions of our Constitution.

It may be mentioned in passing that we think that the State may pay for the administration of the program so long as it does not make direct contributions to farmers and ranchers, and thus the $ 35,000.00 appropriated for administrative costs under Senate Bill No. 180 may be lawfully used to administer the program if the Federal Government will continue to make the moneys available to farmers and ranchers in the amount of $ 7.50 per ton of roughage purchased.