

Opinion No. 71-103

August 27, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Office of the Attorney General of New Mexico

QUESTIONS

FACTS

The Town of Vaughn has utility lines within the right-of-way of U.S. Highways 54, 60 and 285. In order to widen these highways, it is necessary that these water and sewer lines be moved. However, they will still remain in the highway right-of-way. The highways involved are not in the interstate system, nor are they extensions thereof within urban areas.

QUESTIONS

Can the State Highway Department legally pay these utility relocation costs?

CONCLUSION

No.

OPINION

{*155} ANALYSIS

Section 55-7-26, N.M.S.A., 1953 Comp. provides for utility relocation costs to be borne by the State in only two situations, to wit:

- (a) relocations necessitated by improvements of public highways in the interstate system, including extensions thereof within urban areas (§ 55-7-26A(1), **supra**); and
- (b) relocations by complete removal and construction of facilities off the public highway (§ 55-7-26A(2), **supra**).

State v. Lavender, 69 N.M. 220, 365 P.2d 652, involved a situation in which the utility lines **were** affected by an improvement in the interstate system and the remainder of which were relocated outside of the right-of-way. In the **Lavender** case the Court said:

"It need also be noted that § 4, subd. A, *supra*, is somewhat in the nature of a statement of policy as heretofore recognized by the courts that the **complete ouster** of a utility

from a public highway may constitute a taking of contract or property rights . . ."
(Emphasis added)

In the 1970 case of **Southern Union Gas Co. v. City of Artesia**, 81 N.M. 654, 472 P.2d 368, our State Supreme Court reaffirmed its "complete ouster" doctrine. It also had this to say:

"At common law, the right of a utility to use the streets is subject to the right of the municipality to require the utility to relocate its lines and facilities when necessary, because of changes in street locations or improvements, or as otherwise required in the interest of the public health and welfare. In the absence of a valid ordinance or statute to the contrary, such removal of facilities must be accomplished at the expense of the utility." See also, **State ex rel. State Highway Comm'n v. Town of Grants**, 66 N.M. 355, 348 P.2d 274.

The cost of the necessary utility relocation in the factual situation you pose, i.e., not an interstate highway improvement or extension thereof within an urban area and no complete ouster from the highway right-of-way, must be borne by the utility.

The State Highway Department cannot legally pay these relocation costs. To do so would violate Article IX, Section 14, New Mexico Constitution.

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