

## **Opinion No. 76-36**

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**BY:** OPINION OF TONEY ANAYA, Attorney General Jill Z. Cooper, Assistant Attorney General

**TO:** Thomas E. Baca, Director, Environmental Improvement Agency, Crown Building, St. Michael's Drive, Santa Fe, New Mexico 87501

### **QUESTIONS**

#### Facts

The increasing use of radioactive materials necessarily results in the need for a safe and efficient means for disposal of radioactive waste products. The Radiation Protection Act, [Sections 12-9-1 through 12-9-11, NMSA, 1953 Comp.] provides at Section 12-9-7, supra, that it is unlawful for any person to possess or dispose of radioactive material without a license. Pursuant to Section 274 of the Atomic Energy Act of 1954, as amended, and Section 12-9-11, supra, of the Radiation Protection Act, New Mexico has entered into an agreement with the United States Atomic Energy Commission whereby the State of New Mexico accepts the authority to regulate that radioactive materials covered by the agreement. Section 12-9-7, supra, would require a company wishing to engage in the business of disposal of radioactive waste materials in New Mexico to obtain a license issued by the Environmental Improvement Agency in accordance with the procedures proscribed by regulation of the Environmental Improvement Board.

The agreement between New Mexico and the Atomic Energy Commission also provides that state regulation of radioactive materials be compatible with the Commission's program for the regulation of such materials. Section 20.302(b), Vol. 10 of the Code of Federal Regulations provides that the Nuclear Regulatory Commission will not approve any application for a license to receive radioactive materials from other persons for disposal on land which is not owned by the federal government or by a state government. In compliance with federal regulations, state licensed waste disposal sites must be on state property and the proposed licensing arrangements include, therefore, provision for indemnification to the state for maintaining the site on public land.

Although radioactive materials gradually decrease in potency, some of the materials to be disposed of may have a half-life of such duration that the period of danger to public health and safety is essentially indefinite. Under these circumstances, there exists the possibility that regardless of any bonding or funding provided by the company, no indemnification scheme can guarantee to be adequate indefinitely.

#### Question

May the Environmental Improvement Agency enter into a license agreement with a regulated business which would obligate the state for the long-term lease of a disposal site or tailings pile without violating Article IX, Section 8 of the New Mexico Constitution?

Conclusion

Yes.

## OPINION

{\*126} Analysis

The basic questions which are raised by the necessity to properly dispose of harmful radioactive waste materials are immensely complicated and not given to easy or obvious solutions. The particular question raised here, however, is a narrow one, dealing only with the applicability of Article IX, Section 8 of the New Mexico Constitution to the proposed licensing of long-term radioactive disposal sites.

Article IX, Section 8 provides:

No debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall have been submitted to the qualified electors of the state and have received a majority of all the votes cast thereon at a general election; . . .

As suggested by the question, long-term licensing of disposal sites in New Mexico may be illegal if it were determined that some obligation may accrue to the state which would constitute a "debt" within the prohibition of Article IX, Section 8.

It is evidently assumed that a private company licensed to operate a radioactive waste disposal site on public land in New Mexico would make some form of payment {\*127} to the state for the maintenance of the site once the company had completed its work there. The obligation which might attach to the state -- and which gives rise to this question -- is the financial burden of maintaining the site if the funding provided by the company were exhausted. On these facts, we conclude that the anticipated state responsibility is not a debt within the meaning of Article IX, Section 8.

"Debt" as used in the Constitution, has been well defined by the Supreme Court of New Mexico. In **Seward v. Bowers**, 37 N.M. 385, 24 P. 2d 253 (1933), the Court stated:

The idea of a 'debt' in the constitutional sense is that an obligation has arisen out of contract, express or implied, which entitles the creditor unconditionally to receive from

the debtor a sum of money, which the debtor is under a legal, equitable, or moral duty to pay without regard to any future contingency. 37 N.M. at 386.

See also **State ex rel. Capital Addition Bldg. Comm'n. v. Connelly**, 39 N.M. 312, 46 P.2d 1097 (1935); **Stone v. City of Hobbs**, 54 N.M. 237, 220 P. 2d 704 (1950). Or, as recently explained in another jurisdiction, no "debt" within the meaning of a constitutional restriction on the contracting of debt "exists unless there is an obligation which is legally enforceable against the state." **Wisconsin Solid Waste Recycling Authority v. Earl**, 70 Wis. 2d 464, 235 N.W.2d 648, 659 (1975).

Thus, it would appear that for constitutional purposes, consideration of the question of debt must begin at least with a fixed obligation to repay a certain sum of money or with a clearly defined outstanding obligation which must be retired. When such an obligation has been found to exist, it may then be determined whether or not the obligation is prohibited by constitutional restriction. In New Mexico, the courts have developed the "special fund doctrine" to resolve questions arising under Article IX, Section 8 of the Constitution. Under that doctrine, any financial obligation not otherwise constitutionally objectionable is valid without approval of the electorate only if it is paid for or discharged in full from monies derived from a "special fund" or sources other than general taxation. See **State Office Bldg. Comm'n v. Trujillo**, 46 N.M. 29, 120 P. 2d 434 (1942).

In this case, however, we find that whatever the responsibility or obligation which may accrue to the State as a result of the licensing arrangement, it is not, in any event, a "debt" and thus, regardless of the source of funds, it could not be prohibited by Article IX, Section 8. That is, under this arrangement, the State does not incur any duty to repay a fixed obligation nor is there any creditor entitled to receive money from the state. We find no authority for expanding the concept of debt beyond those essential elements. All the New Mexico cases arising under Article IX, Section 8, 10, 11 and 12 have involved a contractual obligation to repay a certain sum of money to someone -- an obligation clearly not present here. The fact that the problems inherent in the licensing of radioactive waste disposal sites may necessitate payments to the state to absorb the cost of maintaining the sites and that that cost may someday be borne by the State does not create a contract of debt out of what is essentially an exercise of police power.

{\*128} If some financial responsibility should be imposed on the state under the proposed long-term licensing arrangement, such a burden should be recognized as incidental to the proper exercise of police power. For example, in **State v. Lavender**, 69 N.M. 220, 365 P.2d 652 (1961) the court upheld a statute requiring the state to pay costs of utility relocations necessitated by highway improvements against a charge that the payments would violate Article IX, Section 14 of the New Mexico Constitution -- the so-called antidonation clause. The court reasoned that the statute was an exercise of police power and, in exercising the police power, the state may legitimately bear some costs to accomplish the greatest public good.

Whatever responsibility the State assumes in the proper exercise of police power, whether costs are involved or not, there is no debt in the constitutional sense unless the state also expressly assumes a contractual obligation to pay some creditor a fixed sum of money or the equivalent until the obligation is retired. As no such obligation is created under the proposed licensing arrangement for radioactive waste disposal sites, there is no debt to which the prohibitions of Article IX, Section 8 could apply.