

Opinion No. 43-4327

July 1, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mrs. Cecilia Tafoya Cleveland, Secretary of State, Santa Fe, New Mexico

We have your letter of June 30th, 1943, requesting an official opinion of this office concerning whether or not the Tobacco Tax is subject to a referendum, and in case referendum petitions are presented to your office, whether or not you should file them.

The preamble to the Tobacco Tax states:

"WHEREAS, cognizance is taken of the extreme need now existent among the needy aged, of this state, and

"WHEREAS, the funds provided presently are not adequate to undertake and administer proper relief to this unfortunate element of our population, and

"WHEREAS, the funds available presently are not commensurate with the need in some cases;

"NOW, THEREFORE, be it declared the policy of this state that the revenues derived by this act are extremely needed to alleviate this unfortunate situation."

The above declaration, made by the Sixteenth Legislature of the State of New Mexico, shows a finding on the part of the Legislature that the needy aged of this State are in extreme need, and that it was necessary, in order to administer proper relief to this unfortunate group, that additional revenues be found, and therefore the Tobacco Tax was enacted.

In other words, it is clear, in view of the legislative declaration that it was necessary, in order to alleviate the extreme need of the aged and thereby preserve the public health, that additional revenues be acquired in order to provide sufficient funds for the administration of proper relief to this group.

Article 4, Section 1 of the Constitution of the State of New Mexico provides, in part as follows:

"The people reserve the power to disapprove, suspend and annul any law enacted by the Legislature, except general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except as in this constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws *

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It is noted that the Constitution expressly exempts laws enacted for the preservation of public health from the referendum provision. As has already been noted, the Tobacco Tax was passed for the purpose of preserving the public health, this fact clearly appearing from the preamble of the Tobacco Tax, even though the exact words "providing for the preservation of the public health" as used in the Constitution, were not used. The applicable rule of law is as follows:

28 Am. Jur., Initiative Referendum and Recall, Section 11:

"* * * If the Legislature has not used language expressly accepting the law, the Legislative intent must be determined by the court from the language used. * * *"

As shown above, the legislative intent in enacting the Tobacco Tax is clearly shown in the preamble of such act, and it is, therefore, my opinion that the Tobacco Tax was enacted for the preservation of the public health, and also the peace and safety, and is expressly exempt under Article 4, Section 1 of the Constitution, from the constitutional provision concerning laws subject to referendum.

The Supreme Court of the State of New Mexico, in considering a similar question, in the case of Todd v. Tierney, 38 N.M. 15, 27 Pac. 2d, 991, stated:

"* * * It is urged, as we have just suggested, that, since laws providing for the public peace, health, or safety are excluded from the right of referendum, an attempt might be made to refer such a law not bearing the emergency clause; that, if such attempt were resisted, it would clearly become the duty of the courts to pass upon and determine whether or not subject to the referendum. And along the same line our attention is called to the fact that all laws excluded from the referendum are listed together in the same paragraph of the Constitution, i. e., general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same; for the maintenance of the public schools or state institutions, and local or special laws.

"What as to any of said laws (except general appropriation laws given immediate effect upon passage by the Constitution itself) not bearing the emergency clause when drawn in question, ask counsel? Would the courts not be called upon, they inquire, to say, for instance, whether a given act does 'provide' for payment of the public debt, or for maintenance of the public schools or state institutions, or whether it is a local or special law? Is the mere omission of an emergency clause to expose to the referendum laws clearly excepted? And, if the law be one such as is obviously excluded, would not the courts have the power so to declare?

"We answer all of these questions affirmatively. It would be the duty of the courts, and they would have the power, under the contingency named, to pass upon and determine the question. But it is one thing for the courts to claim and exercise such power where the Legislature has remained silent and quite another thing to do so where the Legislature has spoken through a solemn declaration of emergent necessity. In any

event, the 'question' to be determined would be the legal one whether the act involved provided for the specified objective and was thus excluded from the referendum. The determination of that question, however resolved, would neither invade nor overturn a legislative finding and declaration of necessity made for the purpose of giving immediate effect to the law as a safety measure, thus placing it within a class of laws to which we hold the Constitution fairly interpreted gives a conclusive presumption of providing for the objects for which they have been declared necessary."

Here, in the present act, the Legislature has, by sufficiently appropriate language, made a finding that the Tobacco Tax was passed for the preservation of the public health. Even if they had not done so, the question could still have been submitted to the courts to determine whether or not it was for the preservation of the public health, and even without the language used in the preamble it is doubtful that, under the circumstances, the act would have been subject to referendum.

In any event, our Supreme Court has indicated a very definite tendency to consider the legislative finding in such matters as conclusive.

In view of the above, it is clear that the Tobacco Tax is not subject to referendum, and that the petitions now being circulated are attempting to subject a law passed for the preservation of the public health, to a referendum, in violation of the Constitution of this State. Therefore, it follows that since such petitions are being circulated for an unconstitutional purpose, you should not file them in your office, since there is no provision in our laws authorizing you to file alleged referendum petitions which are attempting to unconstitutionally suspend and subject to a referendum a law enacted by the Legislature of this State for the preservation of the public health.

Hoping that the above fully answers your questions, I remain