

Opinion No. 51-5404

August 27, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Burton G. Dwyre State Highway Engineer State Highway Department Santa Fe, New Mexico

{*106} This is in reply to your letter of July 10 concerning the effect upon the funds of the Highway Department by § 8 of the 1941 Appropriation Act, which reads as follows:

"There shall be included in the operating budget of the State Highway Department, for each of the 40th and 41st fiscal years the amount of \$ 1,280,750.00 for general administrative overhead; said \$ 1,280,750.00 shall be paid by the department each year into the State General Fund, representing a share of said department in the general administrative cost of the state government."

You were also concerned with the effect upon your department's funds of Chap. 181 of the Laws of 1951, the measure which assessed a charge of 5% of each state agency's or department's budget to be paid over into the state general fund to pay for administrative overhead.

The copy of the letter which you enclosed in your request to me, being the reply of the Commissioner of Public Roads, Mr. Thomas H. McDonald, to your inquiry as to whether the paying over of any sum as required by the two foregoing laws, would cause a loss to the state of federal funds was in the affirmative. Mr. McDonald advised that this use of the road fund would be considered a diversion contrary to the provisions of the Act of Congress of June 8, 1934 (48 Stat. 933). He said in his letter that such a diversion "would render the state liable to a reduction of one-third of its apportionment of federal aid for highways for the fiscal year for which such apportionment is made." He stated further, to illustrate his statement, that there has been apportioned to New Mexico for the fiscal year 1952 the sum of \$ 6,551,950.," and to show what might be lost "one-third of which would be \$ 2,183,650." I agree with Mr. McDonald's interpretation of the law. The Federal Aid to Highways Act, in § 55 U.S.C 1946, provides that a state may lose up to one-third of its apportioned federal aid highway money if there is any diversion by the state to purposes other than for the "construction, improvement or maintenance of highways" of the money received by the state from "state motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor vehicle owners and operators of all kinds."

All of the money allocated by our statutes to the Highway Department road fund is derived from taxes or fees related to motor vehicles as contemplated by the Federal Act cited above.

It is clear that a diversion prohibited by the Federal Aid to Highways Act would cause a loss of federal aid moneys to the state. Both the General Appropriations Act and Chap. 181 of the Laws of 1951 have provisions exempting state departments from the application of the assessment imposed for administrative overhead in cases where the levying of a charge or assessment "would result in withholding by the federal government of funds for which the departments or agencies concerned would otherwise be eligible."

It is my opinion that the assessment or appropriation of any portion of the State Road Fund for administrative overhead would be such a diversion as to cause the loss of federal funds and, therefore, the department is exempt under the terms of both the Appropriation Act and Chapter 181 of the Laws of 1951.