

Opinion No. 59-03

January 20, 1959

BY: FRANK B. ZINN, Attorney General

TO: S. E. Reynolds State Engineer P. O. Box 1079 Santa Fe, New Mexico. Attention Mr. Reynolds

Re: Diversion of irrigation works construction fund money for state's general administrative costs.

OPINION

{*6} Your letter seeking my opinion asked these questions:

1. Do the provisions for the payment of 5% of total budget for "administrative overhead expenses" to the general fund, as set forth in Section 6-C of Chapter 235, Laws of 1957, apply to the moneys appropriated to the State Engineer from the New Mexico irrigation works construction fund?
2. If such provisions do not apply, may a refund be made for "administrative overhead expense" amounts charged these funds in the past and present fiscal years?

In my opinion the answers to your questions are as follows:

1. The "administrative overhead expenses" of 5% of the total budget cannot be charged against any Enabling Act Trust Funds.
2. If such funds have been diverted under Section 6-C, Chapter 235, Laws of 1957, such money must be replaced.

The opinion I have rendered is based upon the following analysis of applicable law.

Section 6-C, Chapter 235, Laws of 1957, reads as follows:

"There shall be included in each budget of departments, commissions, board, and agencies, exclusive of the state highway department, department of game and fish and the state land office, an item for 'general administrative overhead' expense equal to five percent of the total budget; provided that any department which makes or has made other arrangements for paying administrative overhead costs shall be excepted from this provision, if approved by the department of finance and administration. Provided further that the budgets for general administrative overhead expense shall be paid each year into the state general fund."

I believe that the case of State ex rel. Shepard v. Mechem et al., 56 N.M. 762, 250 P. 2d 897, completely answers both questions. In this case, the Supreme Court considered the effect of Chapter 181, Laws of 1951, which provided for a 5% operating charge on the budgets of the various departments. This 5% fund was to be transferred to the general fund to defray the cost of operating expenses of the government. It can be seen that the Court had before it a provision almost identical to Section 6-C of Chapter 235, Laws of 1957. The question was whether such an administrative charge could be made against Enabling Act trust funds. The Court determined that such a charge would be illegal diversion of trust fund money and that the Legislature was without power to enact such a provision so far as Enabling Act funds were concerned.

The New Mexico irrigation works construction fund is an Enabling Act fund created by the Ferguson Act, 30 Stat. 484, and is subject to the trust imposed by Section ten of the Enabling Act. It falls within the category of funds which the Supreme Court said could not be diverted to the general fund for administrative purposes.

The Supreme Court further stated in the Shepard v. Mechem case:

{*7} "In view of the funds available in the general fund, the money can be restored to the trust funds by book entries, and this the treasurer must do."

It is obvious then that (1) Section 6-C of Chapter 235 of the Laws of 1957 cannot apply to the trust funds set up by the Enabling Act, and (2) if there has been a diversion of such funds into the general fund under this Section 6-C, that the same must be replaced, and that this replacement can be accomplished by a transfer back by the Treasurer of the funds which have been diverted.

Paul L. Billhymer