

## Opinion No. 64-11

January 28, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Wayne C. Wolf, Assistant Attorney General

**TO:** Alberta Miller, Secretary of State, State Capitol Building, Santa Fe, New Mexico

### QUESTION

#### QUESTION

When service of process against a corporation is made on the Secretary of State by the State Highway Commission, must the Commission pay a \$ 3.00 fee to the Secretary of State, pursuant to Section 21-3-5, N.M.S.A., 1953 Comp.?

#### CONCLUSION

No.

### OPINION

#### ANALYSIS

Section 21-3-5, N.M.S.A., 1953 Compilation, provides for service of process to be made on the Secretary of State. Insofar as applicable that Section reads:

"Or in case the agent of any such corporation designated by any such corporation as the agent upon whom process against the corporation may be served shall die, or shall resign, or shall remove from the state, or such agent cannot with due diligence be found, it shall be lawful while such default continues, to serve process against such corporation upon the secretary of state, and such service shall be as effective to all intents and purposes as if made upon the president or head officers of such corporation, and within two (2) days after such service upon the secretary of state as aforesaid, it shall be the duty of the secretary to notify such corporation thereof by letter directed to such corporation at its registered office, in which letter shall be enclosed a copy of the process or other paper served, and it shall be the duty of the plaintiff in any action in which said process shall be issued to pay to the secretary of state, the sum of three dollars (\$ 3.00) **which sum shall be taxed as a part of the taxable costs in said suit . . .**" (Emphasis supplied)

The question which we must answer therefore, is whether or not a lawful agency of the state of New Mexico is required to pay this fee which is a part of the costs of the suit. We first note that Rule 54 of the Rules of Civil Procedure provides that costs are taxed against the state and its agencies only when and to the extent permitted by law. We find

no statute which permits any fees or costs to be taxed against the State Highway Commission.

We also point out that a very similar situation was encountered and discussed by this office in 1933. In Attorney General's Opinion No. 97 at page 101 of Attorney General's Opinions 1933-34, this office felt that the State of New Mexico should not pay a \$ 2.00 fee which was ordinarily required of other plaintiffs for service of process. That opinion also states that absent a specific statute on the subject the state is not required to pay any costs in connection with any suit whether the State is the plaintiff or defendant. We are, therefore, of the opinion that the State Highway Commission of the State of New Mexico does not have to pay the \$ 3.00 service of process fee provided for in Section 21-3-5, N.M.S.A., 1953 Compilation. We suggest in accordance with Attorney General's Opinion No. 97, that you show this service on your books as being free process of the State of New Mexico.