

## **Opinion No. 68-25**

February 21, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. L. G. Boles Chief Highway Engineer New Mexico State Highway Dept. Post Office Box 1149 Santa Fe, New Mexico 87501

### **QUESTIONS**

The General Appropriation Act passed by the Second Session of the 28th Legislature reads as follows at Page 16, lines 8 and 9:

"State funds in those line items where matching federal funds are available will be expended only for matching purposes."

Does the language quoted above have the effect of prohibiting an expenditure of state funds in a particular line item category when no federal funds are available for matching that particular expenditure while at the same time federal matching funds are available for matching other expenditures in the same line item category?

### **CONCLUSION**

No.

### **OPINION**

#### **{\*47} ANALYSIS**

In the construction of highways, many items of expenditure are required and of necessity some are expenditures where no Federal participation exists. An example of this would be participation in a condemnation judgment which included elements of damage that are held to be non-compensable by the Federal government. In such a case, there would be no Federal participation in the amount of the judgment as some portion of it compensated for items held to be non-compensable by the Federal government. If the total amount of the judgment could be broken down and segregated between those items held to be compensable and non-compensable by the Federal government, Federal participation might be available for that part of the judgment which did not have non-compensable elements of damages. Of necessity, in such a case, an expenditure of State money would have to be made with no Federal participation. This would be true even though there still was Federal money available for participation in future judgments concerning right of way acquisitions on the same highway project when those judgments did not include elements of damages held to be non-compensable by the Federal government.

Such a situation exists in those states where the laws of compulsory land acquisition require the compensating for elements of damages deemed to be non-compensable by the Federal government. The expenditure of state money with no Federal participation also sometimes occurs when a highway project is programmed and constructed using stage construction. As an example, when a highway project's base course is graded and finished for the application of surfacing materials and then construction operations are suspended for a period of one year, or some like time, because of the stage construction programming, it is often necessary to do additional work in the finishing of the base course before the surfacing materials may be applied. In such a case there is no Federal participation available for the additional work required because the surfacing could have been applied without the additional work being performed had there not been a lag in construction work because of the stage construction program. This is true even though many times there are sound economic {\*48} reasons that dictate the wisdom of constructing a highway under a stage construction program. But apparently the Federal government takes the position that the project should have been completely constructed at one time even though this might result in a higher overall construction cost to both the state and Federal governments.

The language in the quoted part of the General Appropriation Act does not prohibit the expenditure of State money where there are no available Federal moneys for matching purposes. As there is no expressed prohibition to the expenditure of State funds where no Federal matching money for the particular expenditure is available, the expenditure of the State money, without availability of Federal matching money, is for one of the specific purposes that is provided for by one of the line items of the General Appropriation Act as it concerns the Highway Department.

It should be pointed out also that in the usual case of highway construction, the expenditure of money is made by the State and after the project is completed, a claim is made to the Federal government seeking Federal participation in the costs. After the project is audited, the Federal government advises the State whether it will participate in the requested amount, a lesser amount, or not at all. In the usual case, the State is able to predict with reasonable accuracy whether or not the Federal Government will participate in the requested amount but there always appear to be some areas where the Federal Government refuses to participate in the project, even in cases where they have so participated in similar prior projects.

To interpret the quoted language of the General Appropriation Act as prohibiting the expenditure of State money in a line item category where there was no matching Federal money available for the particular expenditure would have the effect of defeating the purpose of the Act and would render it impossible to construct highways in the manner that has been used since the advent of Federal Aid Programs designed to facilitate the construction of an adequate Federal highway network. This should not be done as such an interpretation is contrary to all accepted rules of statutory construction. The statute should be construed so that the entire spirit and intent of the legislation may be effectuated. **State. ex rel Ward v. Romero**, 17 N.M. 88, 125 Pac. 617. Section 4703, Vol. 2, Statutes and Statutory Construction, J. G. Southerland, Third Edition.

The foregoing makes it apparent that interpreting the quoted language of the General Appropriation Act as prohibiting expenditure of State money when no Federal matching funds are available to offset the particular expenditure is not in keeping with the legislation intent, and would defeat the entire purpose of this part of the Appropriation Act.

By: Oliver E. Payne

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