

## Opinion No. 31-310

November 17, 1931

**BY:** E. K. Neumann, Attorney General

**TO:** Mr. J. M. Lujan, State Comptroller, Santa Fe, New Mexico.

{\*118} Your letter of even date has been received and in which you quote that part of Section 134-513, New Mexico Statutes, Annotated, 1929 Compilation, which is as follows:

"Provided that in no case shall the Comptroller authorize or permit the use of funds in any Sinking Fund, Interest Fund, Road Fund or Building Fund, for any purpose other than the specified purpose for which such fund was created."

You state in your letter that in your opinion this clause prohibits the comptroller from allowing the use of these funds except for their specified purpose and prohibits the various sub-divisions of the state, including municipalities, from using Sinking and Building Funds for any purpose except the specified purpose for which they are provided.

You desire to know whether this clause expressly prohibits the loaning of Sinking Fund monies to another fund and also if it is broad enough to include the earnings of monies in these funds, such as interest on deposits or investments and securities.

In the first place we desire to point out that the clause above quoted is a restriction or limitation upon the powers and duties of the State Comptroller rather than upon the sub-division. In other words, under this proviso, the Comptroller is prohibited from authorizing or permitting the use of funds in any Sinking Fund, Interest Fund, Road Fund or Building Fund for any purpose other than the specified purpose for which such fund was created.

However, when a sub-division does in fact use any of the said funds for a purpose other than that for which it was created, then, perhaps such sub-division would be liable in case of a shortage in the fund or perhaps an injunction would lie to restrain the alleged proposed diversion of funds.

The limitation or restriction upon municipalities and officials of such, regarding diversion of funds derived from bond issues or other evidences of indebtedness is found in Section 90-1001 of the 1929 Compilation.

This has been construed in the case of Page vs. Town of Gallup, 26 N.M. 239 wherein it was held that a municipality in its discretion may authorize its property to be used incidentally for a purpose other than that for which it was primarily purchased or

constructed, if such incidental use does not interfere with the use for the primary purpose.

Reasoning by analogy it would seem that the same principle could be applied in considering whether a Sinking Fund or its earnings by means of interest can be loaned to another fund. Of course, there can legally be no diversion in fact, but the clause under construction here does not expressly prohibit such use and as we have said it is a limitation {*\*119*} upon the Comptroller, rather than upon the sub-division.

By Frank H. Patton.

Asst. Attorney General