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October 5, 1967

DEPARTMENT OF LAW OPINION NO. 67-21 (R-109)

REQUESTED BY: JUSTIN HERMAN, Director
Arizona Highway Department

QUESTION: Under the provisions of A.R.S. § 35-131.12(B)
(4), may Highway Department supplies, equip-
ment and materials, purchased with monies from
the State Highway Fund, be transferred or other-
wise disposed of without reimbursement to the
Highway Fund?

ANSWER: No.

A.R.S. § 35-131.12(B) provides:

"The Commissioner of Finance, through the Purchasing
Division, shall have the following powers:

* * *

4. Transfer to or between budget units and sell,
rent, trade in, condemn or otherwise dispose of
supplies, materials and equipment of budget units
which are surplus, obsolete or unused. In the case
of a transfer to or between budget units any funds
appropriated to the receiving budget unit for the
purpose of acquiring the item transferred shall
not thereafter be available to the budget unit
for any purpose."

Conversely, the Constitution of the State of Arizona,
Art. 9, § 14, states that:

"No moneys derived from fees, excises, or license
taxes relating to registration, operation, or
use of vehicles on the public highways, or to
fuels used for the propulsion of such vehicles,
shall be expended for other than cost of admini-
stering such laws, statutory refunds and adjust-
ments provided therein, cost of construction,

reconstruction, maintenance and repair of public highways and bridges. (Emphasis supplied).

Although the Arizona court has not had occasion to review this exact question, other neighboring jurisdictions with similar constitutional provisions have held that the earmarking of these revenues solely for highway purposes was to prevent their diversion to anything not designated construction, reconstruction, repair or maintenance of highways. Newman v. Hjelle, 133 N.W.2d 549 (N.D. 1965). See also Watrons v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950); Banner v. City of Laramie, 74 Wyo. 429, 289 P.2d 922 (1955). More precisely stated, "It is clear that the purpose of the amendment was to prevent any use of the earmarked revenues for anything but highway purposes and not to restrict the terms of the amendment by a narrow construction of the purpose for which the revenues may be used within the area designated." Newman v. Hjelle, supra.

The rule is well-settled that when construing a constitutional provision, the court may look to the history of the times, and examine the state of being in existence with the provision in question was framed and adopted. Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Company, 39 Ariz. 65, 4 P.2d 369 (1931); Valley National Bank v. First National Bank, 83 Ariz. 286, 320 P.2d 689 (1958).

With the aforementioned construction guide in mind, a look at the Publicity Pamphlet published and distributed on or about November 4, 1952, which pertained to the arguments set forth pro and con to the adoption of the amendment in question, is helpful. This publication stated that the popularly called "Better Roads Amendment", to the constitution proposed "to insure the expenditure of all revenues derived from road users to road uses only." Further, the pamphlet argued that "because the network of highways is of paramount importance to the United States, the Federal Government grants aid to Arizona for construction of primary, secondary and urban highways. This aid to Arizona is 72 cents per \$1.00, but only if the Arizona user tax revenues

are used exclusively for public highway, street and road purposes." Following the action taken by twenty-one other states prior to 1952, Arizona's citizens then adopted the amendment by the overwhelming majority of about 2.6 to 1 (138,094 to 48,409), and earmarked all road user taxes for roads. These arguments utilized in securing an affirmative vote from the people clearly show that the purpose of the amendment was to dedicate revenues from highway user taxes solely to public highway purposes.

A.R.S. § 18-134 provides:

"The highway department is declared to be subject to the provisions of chapter 1 of title 35 relating to public finances, and all other acts of the legislature applicable to the expenditure of public monies. The highway department shall conform in all respects to the state budget system and no expenditures shall be made by the department when and until they have first been authorized by the legislature and the money appropriated therefor."

It thus appears that although this immediately above-mentioned provision requires the authorization to purchase the department's necessary supplies, materials and equipment, and A.R.S. § 35-131.12(B)(4) allows the transfer of these articles between budget units, the provisions of Art. 9, § 14 of the Arizona Constitution would preclude the disposal of these supplies, materials and equipment, purchased with highway allotted monies, from the highway fund without reimbursement. All public officers entrusted with administrative responsibilities in connection with such a fund have a fiduciary duty to administer the res of this public trust with due care and prudence. Thus, any unlawful diversion of these funds held in public trust would be a breach of their assigned fiduciary duties. Derieg v. Board of Education, 202 Okla. 577, 216 P.2d 307 (1950); Merritt Independent School Dist. No. 2 v. Jones, 207 Okla. 376, 249 P.2d 1007 (1952).

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Attorney General's Opinion No. 67-20 held that when property which had been purchased from revenues in the state compensation fund is disposed of pursuant to A.R.S. § 35-131.12 (B) (4), the proceeds received from such disposal revert to the state compensation fund, and not to the state general fund. The compelling persuasion which led this office to that conclusion applies with equal force to the State Highway Fund. To summarize, it is, therefore, the opinion of this office, that while Highway Department supplies, materials and equipment may be transferred to other budget units under the provisions of A.R.S. § 35-151.12(B) (4), the State Highway Fund from which they were purchased, and which is held in public trust for the taxpayers of the State, must be fully reimbursed by the current value of the item of disposal.

Respectfully submitted,



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The Attorney General

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