

OPINION
53-49

May 20, 1953 (OPINION)

HIGHWAY CONSTRUCTION

RE: Charge by State Against Counties

We have received your request for an opinion concerning a charge which you state has been made against the several counties of this state by the State Highway Department for services connected with the county federal aid secondary roads.

You state that proposed charge would amount to 1% of the total cost of these projects and you ask if the State Highway Department may validly make such a charge.

It is our opinion that there is no basis in law for the proposed assessment.

Section 24-0103 of the North Dakota Revised Code of 1943, which after July 1, 1953, will become law in a slightly modified form as section 24 of House Bill No. 560, provides as follows:

"24-0103. FEEDER ROADS; COMMISSIONER MAY COOPERATE WITH FEDERAL GOVERNMENT. The state highway commissioner may receive any appropriations made by the congress of the United States to be applied to secondary or feeder roads and other roads or streets not on the state highway system and may carry out the intent and purpose of such appropriations to the same extent that the now may cooperate legally on roads which are on the state highway system."

The commissioner is thereby broadly empowered to act in behalf of the counties in the receiving of federal appropriations and to do all things necessary to carry out the intent and purpose of such appropriation. On the other hand, the commissioner is given a certain amount of discretion in this respect and it is difficult to say what the commissioner is required to do under this provision.

Clearly, however, he is not given the authority to assess any charge for this service and we must assume from this that he does not possess such power unless it is elsewhere so provided.

Section 24-0104 of the North Dakota Revised Code of 1943, which will become law after July 1, 1953, as section 113 of House Bill No. 560, provides as follows:

"24-0104. STATE FUNDS NOT USED ON FEEDER ROADS. No state funds shall be expended for feeder roads or other roads not on the state highway system except for the necessary administrative costs and for such work as is reimbursable from federal or county funds or other organizations or governmental department for which reimbursement arrangements have been made. After completion of any such cooperative construction, all

authority and control overroads off the state highway system shall be returned to the local authorities under whom control was vested previously."

From this we note that no state funds may be used for work on roads other than those on the state highway system. Two exceptions are made to this general rule and they are as to "necessary administrative costs" and for work which may be reimbursed from county or federal funds. As to the latter of these exceptions, it is further provided that the work may be done when such work is reimbursable and "for which reimbursement arrangements have been made."

In view of the fact that the North Dakota County Commissioners' Association has gone on record as opposing the charge to which you refer, we may assume that no reimbursement arrangements have been made. Therefore, because state funds cannot be used for work not of an administrative character done in connection with roads not on the state highway system and no reimbursement arrangements have been made to finance such work, such work is being performed contrary to statute and, of course, no charge may lawfully be made by the state highway commissioner to pay for such work.

If the work is of an administrative nature, it is our opinion that such work must be performed by the highway department without charge to the counties.

ELMO T. CHRISTIANSON
Attorney General