

Opinion No. 55-6116

February 25, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Hon. Calvin Horn, State Senate, Santa Fe, New Mexico

In your letter dated February 24, 1955, you requested an opinion as soon as possible concerning HB 45. You inquire whether under the law covering State highway debentures it is possible to reduce the amount of motor vehicle fees placed to the credit of the state road fund, which are to be used and disbursed as other moneys in the state road fund.

HB 45, if passed, provides for a reduction from 45% to 15% of the motor vehicle fees which shall be placed to the credit of the state road fund and increases by 30% the amount of such fees to be distributed to the counties. The laws authorizing the issuance of highway debentures to anticipate the proceeds of collection of any or all of the gasoline excise taxes, motor vehicle registration fees, property and other taxes to the extent to which it is provided by law that the proceeds of the collection of such fees and taxes shall be covered into the state road fund, etc., are contained in the appendix to Volume No. 2 of the 1953 Compilation, beginning at page 589. The 1937 Act authorizing highway debentures and subsequent acts on this subject all contain substantially the same language, as follows:

"The issue and sale of said debentures shall constitute an irrevocable contract between the state of New Mexico and the owner of any of said debentures that the fees and taxes pledged for the payment thereof, at the rate now provided by law, shall not be reduced so long as any of said debentures remain outstanding and unpaid and that the state will cause said taxes and fees to be promptly collected and sufficient thereof set aside and applied to pay said debentures and interest according to the terms thereof."

Section 2 of the act also provides as follows:

"The treasurer of the state of New Mexico shall keep a correct record of all such debentures issued and from the proceeds of the collection of the taxes and fees pledged to pay the same under the authority hereof he shall first set aside each month in a separate fund a sufficient amount to pay the interest accruing each month on said debentures, and during the twelve months next preceding the maturity of each series of such debentures he shall set aside from said proceeds sufficient money to provide for the payment of the principal thereof at maturity."

In *Streit vs. Lujan*, 35 NM 672, the Supreme Court had before it for consideration the 1929 law authorizing the Highway Commission to pledge revenue received from gasoline taxes, the proceeds of which were by law required to be covered into the state road fund, together with the 1931 law providing for refunding gasoline taxes in certain

instances and setting up a suspense fund for that purpose. This suit was brought by a bond-holder primarily on the theory that the entire revenue from gasoline taxes, under the language of the statute and debentures, was pledged for the payment thereof and that the provision for refunds constituted an impairment of the contract. The Court, considering the debentures and the statute as a whole, came to the conclusion that only so much of the revenue collected from gasoline taxes was pledged as was sufficient to pay the interest and principal becoming due annually. The contention was also made that refunding a part of the excises was equivalent to reducing them and thus expressly violated the provision of the debentures and the act to the effect that the fees and taxes pledged at the rate provided shall not be reduced. In that connection, this statement appears:

"In some situations it might be proper or necessary to admit the equivalence of the two. But the question now being the impairment of the obligations of appellant's contract, the two things are vastly different. Had the state reduced the rate of the excises or granted exemptions, it would have impaired irrevocably the fund, to the whole of which the debenture holders may look, if necessary, for their satisfaction. The Legislature has not done this. It has maintained the fund; merely employing surpluses, when there are any, for its own aims. Now it is using them to make refunds. The next Legislature may direct their use for some other purpose. So long as they are surpluses, it is quite immaterial to appellant how they are employed."

In connection with making the refunds, it should be noted that a suspense fund of \$ 25,000 was set up and that this small sum from the road fund is far different from diverting two-thirds of the motor vehicle fees from the state road fund to the counties. Such a diversion, in view of the express language of the statute pledging the proceeds for the payment of debentures, on its face would appear to be an irrevocable impairment of the fund. Certainly, if any of the motor vehicle fees diverted from the state road fund are necessary or should become necessary in the future to pay the debentures and the interest thereon, HB 45 would impair the contract of the debenture holders and could not be sustained.

There are, at present, outstanding highway debentures in the sum of \$ 11,070,000 and more issues may be anticipated. It is not known what amount or what proportion of the excise taxes covered into the state road fund will be necessary to meet these obligations and, in the absence of definite information, the diversion of the motor vehicle fees from the state road fund provided in HB 45 may be invalid as impairing the contracts and prior irrevocable pledges of the state.

In the above-mentioned case, the Supreme Court further used the following language:

"In the absence of this provision (referring to Art. 9, Section 16 of the Constitution), the Legislature, having once pledged revenues, could not divert, abolish or reduce them until the pledge had been redeemed. ****."

In view of the language in this case, although the Court sustained the statute providing for a suspense fund and the payment of refunds on gasoline taxes, it is our opinion that the Court, in construing HB 45, would hold the same invalid because of the fact that it reduces the revenues going to the state road fund from 45% thereof to 15% during the period such revenues are specifically pledged for the payment of highway debentures, which are still outstanding. This seems to be particularly true since the rate of distribution to the Highway Department of 45% of the motor vehicle taxes was fixed by statute at the time all of the outstanding debentures were issued.

By C. C. McCulloh

Assistant Attorney General