

Opinion No. 26-3903

August 3, 1926

BY: ROBERT C. DOW, Assistant Attorney General

TO: Hon. R. H. Carter, State Comptroller, Santa Fe, New Mexico.

This Office is in receipt of your letter of July 26 together with a letter from Mr. John J. Kennedy, City Attorney of Santa Fe, wherein you request an opinion as to whether or not certain unexpended balances now in the Trunk Line Sewer Fund of the City of Santa Fe can be expended as follows:

1. To pay, in part or in full, the outstanding obligation of the City for paving.
2. To pay, in part or in full, the outstanding obligations of the City for sewer construction.
3. To pay, in part or in full, the City share of sewer construction, other than trunk line, program of 1926.
4. If possible, to call in certain outstanding bonds bearing a high interest rate.

I understand from your letter that there is a surplus in the Trunk Line Sewer Fund, such surplus arising from the sale of the trunk line sewer bonds, and that such surplus is due principally to the fact that a high price was paid for the bonds, and that the contract for the installation of the proposed sewer system was much less than had been anticipated.

§ 9, Article 9, of the New Mexico State Constitution is as follows:

"Any money borrowed by the state, or any county, district, or municipality thereof, shall be applied to the purpose for which it was obtained, or to repay such loan, and to no other purpose whatever."

§ 12, Article 9, New Mexico State Constitution, is, in part, as follows:

"No city, town or village shall contract any debt except by an ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purposes to which the funds to be raised shall be applied, and which shall provide for the levy of a tax, not exceeding twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal."

§ 12 above referred to prohibits a city from contracting any debt except by ordinance which specifies the purpose for which the funds to be raised shall be applied, and

provides that the proceeds of such tax shall be applied only to the payment of such interest and principal.

§ 12, as read in connection with § 9, would seem to make it incumbent upon the City to apply the surplus now in said Fund either to the purpose for which it was obtained, or to repay such loan, and in the wording of the Constitution it could be applied "to no other purpose whatever."

If the City obtained from the sale of the bonds more money than was necessary to apply to the purpose for which the money was obtained, then the balance of the surplus money remaining in said Fund, in my opinion, is in effect a trust fund which should be used for the purpose of paying off the outstanding bonds which were voted for the purpose of constructing such sewer system.

This will lighten the burden of taxation, and, in effect, only collect from the taxpayers the actual amount of money which was necessary to construct the sewer system, and thereby comply with the obvious intent and purpose of the two sections of the Constitution above referred to.

Aside from the foregoing, there is still another reason why the payment of money from this fund for other purposes than for which it was obtained would be entirely in conflict with the New Mexico Constitution; § 13 of Article 9 of the Constitution places a limitation upon the indebtedness of cities not to exceed four per centum on the value of the taxable property within such city, except cities may contract debts in excess of such limitation for the construction or purchase of a system for supplying water, or of a sewer system. A city might, therefore, issue bonds in an unlimited amount for the construction of a sewer system, such amount of indebtedness might be carried far beyond the four per centum limitation, and if the money was actually used for the purpose for which it was obtained this would be entirely legal, but after having passed such four per cent limitation, if the city could expend large surpluses for other purposes then it would be doing indirectly the very thing which the Constitution prohibits doing directly. For the foregoing reasons I am of the opinion that the money obtained from the sale of the sewer bonds should be either used for the purpose for which it was obtained, or to repay such loan.