

in Section 53-122 (b), R.C.M., 1947, as amended by Chapter 221, Laws of 1951, Chapter 215, Laws of 1953, and Chapter 41, Laws of 1955, or should this fee be paid into the county treasury for the use and benefit of the county's general fund?

The applicable portion of Section 53-122 (b), supra, as amended, is as follows:

"The license fees held in the city road fund, as hereinbefore provided, at the end of each thirty (30) day period beginning March 1, 1955, be paid by the county treasurer to the city treasurer to be held by such city treasurer in a separate fund designated as the 'city road fund,' shall be used by the city council of such city having the population of thirty-five thousand (35,000) or more, or by the city council of such city which lies within one (1) mile of the city limits of an incorporated city of the state of Montana, having a population of thirty-five thousand (35,000) or more, according to the federal census of 1930, or by the city council of such city having a population of ten thousand (10,000) or more, according to the federal census of 1950 and situated in the county which has an area of less than seven hundred and fifty (750) square miles, only for the construction of permanent highways and streets within the boundaries of such incorporated city. Provided, that all construction of public highways and streets, the cost of which is to be paid out of the fund derived from the license fees as herein provided, shall be under the supervision of the county surveyor of the county within whose boundaries such city is situated, subject to the control of the said city council and surveyor to designate the public highway or street upon which the work is to be done, and the type of pavement to be used, and provided further, that the cost of supervision of the county surveyor shall not exceed five per cent (5%) of the cost of said work."

Opinion No. 75

**County Surveyor — Officers —
Payment of County Surveyor**

HELD: A county surveyor is entitled to payment for supervisory services performed in the construction of city streets, under the provisions of Section 53-122 (b), R.C.M., 1947, and the fee to which he is entitled should not be paid into the county treasury for the use and benefit of the county's general fund.

May 29, 1956

Mr. N. A. Rotering
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Rotering:

You have asked my opinion upon the following question:

Is the county surveyor entitled to receive payment for his own personal use of the fee provided for

In addition to the main question stated above, the question is raised whether payment to the county surveyor would violate one or all of the following sections:

"25-201. Disposal Of Fees Collected By County Officers. No county officer shall receive for his own use, any fees, penalties or emoluments of any kind, except the salary as provided by law, for any official service rendered by him, but all fees, penalties and emoluments of every kind must be collected by him for the sole use of the county and must be accounted for and paid to the county treasurer as provided by Section 25-203 of this code and shall be credited to the general fund of the county."

"25-202. What Officers To Receive Fees For Their Own Use. The county surveyor, coroner, public administrator, justice of the peace, and constable may collect and receive for their own use, respectively, for official services, the fees and emoluments prescribed in this chapter. All other county officers receive salaries."

"25-209. No Fees To Be Charged State, County Or Public Officer. No fees must be charged the state, or any county, or any subdivision thereof, or any public officer acting therefor, or in habeas corpus proceedings for official services rendered, and all such services must be performed without the payment of fees."

Further, it must be pointed out that the provisions of Section 32-303, R.C.M., 1947, provide in part that the county surveyor shall "perform such other duties as are now, or which may hereafter be required by law . . ." at the annual salary fixed in that section.

It should be noted, first, that Sections 25-201, 25-202 and 25-209, supra, were enacted in 1895, and have remained substantially unchanged since. Section 32-303, supra, was enacted in 1927, and was last amended in 1931. The portion of Section 53-122, supra, with which we are concerned was enacted in 1933. Since

it is the latest expression of the legislative will, its provisions, in case of conflict, are controlling. (*State v. Miller*, 69 Mont. 1, 220 Pac. 97).

Prior to the enactment of Section 53-122 (b) in its present form, the county surveyor had no jurisdiction over, and no duties with regard to city streets. The statutes then in effect, Sections numbered 11-906 and 84-4735 in the Revised Codes of 1947, provided, in substance, that no street or alley in a city or town is a county road, or part of a county road district (Section 84-4735, supra), and that the city or town council had exclusive jurisdiction of the city streets (Section 11-906, supra). The exclusive jurisdiction of the city council over streets was also affirmed by our Supreme Court in the case of *Snook v. City of Anaconda*, 26 Mont. 128, 66 Pac. 756, and *Ford v. City of Great Falls*, 46 Mont. 292, 127 Pac. 1004.

The duties of the county surveyor previous to the enactment of Section 53-122, supra, related entirely to county roads outside of city and towns. (See Sections 32-303, supra, and 16-3301, et seq. R.C.M., 1947).

By the enactment of Section 53-122, supra, the county surveyor was given comprehensive duties, including the supervision of the construction of all public streets and highways within city limits which were paid for out of the license fees in the city road fund. These duties were an addition to his existing duties with regard to county roads and highways. It is evident from the language of the act that a sum of not to exceed 5% of the cost of the work could be expended for the cost of supervision by the county surveyor. Since the duties which the surveyor must perform for the county were not diminished by the act, it seems illogical to assume that this amount was intended to be paid to the county. On the other hand, it is an established rule of law that a public officer may receive increased compensation for increased duties, even if he is within a constitutional prohibition against increasing his salary during his term. (*Dunkel v. Hall Co.*, 89 Neb. 585, 131 N.W. 973; *Taylor v. Davis*, 212 Ala. 282, 102

So. 433, 40 A.L.R. 1052). As the county surveyor has been given extra duties, which must be performed for the city, and not the county, while at the same time performing all of his existing statutory duties for the county, it seems evident that the statute, which contemplated payment for the costs of his services, meant the payment to be made to him.

This has been the understanding of the public officials charged with the administration of this act since its inception, and such payments have been made to the county surveyor himself. This provision of the statute has been before the legislature on five occasions since its original enactment and, on each occasion, the legislature has re-enacted the language of Section 53-122, *supra*, without change. When the legislature re-enacts a statute which has been interpreted in a particular manner by the executive agency, charged with its enforcement, and does not change the provisions so interpreted, it is presumed that the legislature is satisfied with the interpretation, and intends to confirm it. (*State v. Rrannon*, 86 Mont. 200, 283 Pac. 202; *Bedford v. Colo. Fuel and Iron Corp.*, 102 Colo. 538, 81 Pac. (2d) 752, *Helvering v. Bliss*, 293 U.S. 144, 56 S. Ct. 17).

It is therefore my opinion that the county surveyor is entitled to payment for supervisory services performed in the construction of city streets, under the provisions of Section 53-122 (b), R.C.M., 1947, and the fee to which he is entitled should not be paid into the county treasury for the use and benefit of the county's general fund.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.