

ignated certain highways as State or State Federal Aided Highways in its records, it retains authority to later withdraw such designation where said highways have not been constructed, improved or maintained as State or State Federal Aided Highways.

July 24, 1935.

State Highway Commission
The Capitol

On July 18, you addressed the following communication to this office:

"The rules and regulations for carrying out the provisions of the Emergency Relief Appropriation Act of 1935 with reference to highways contain in Section 2, the following definitions of feeder highways:

"'Secondary or feeder roads,' for the purpose of these regulations shall be divided into three classes and defined as follows:

(1) roads outside of municipalities or metropolitan areas which are not included in the Federal-aid highway system or the State highway system in States which have not taken responsibility for important county or township roads or roads of similar classification (WPSO). (2) roads outside of municipalities or metropolitan areas which are a part of the State highway system but not included in the Federal-aid highway system (WPSS). (3) roads or streets within municipalities or metropolitan areas which are not included in the Federal-aid highway system (WPMS)."

Section 3 of these rules and regulations requires that not less than 25% of the highway apportionment to Montana shall be applied to secondary or feeder road projects of the first classification above given (WP SO); and further requires that not less than 25% of the apportionment shall be applied to sections of the Federal Aid highway system within municipalities or metropolitan areas, or secondary or feeder roads of the third classification, (WPMS).

In order to handle and place under construction feeder road projects of the first and third classifications above given, it will be necessary for the Highway Commission to spend

Opinion No. 147.

Highways—State Highway Commission, Authority Over Highways—Secondary Roads—Feeder Roads.

HELD: 1. The State Highway Commission has authority to establish, lay out, construct, improve and maintain public highways other than State or State Federal Aided highways.

2. The commission has authority to expend certain parts of its revenue, accruing to the State Highway Fund, for the purposes above set forth.

3. After the commission has des-

certain parts of its revenue accruing to the State Highway Fund for the purposes of preconstruction engineering, purchase of right of way, certain construction items, etc.

We are now faced with the necessity to spend State Highway Fund revenue for feeder highways under the first classification above which are not on the State Highway system (and cannot be put on the State Highway system), and upon feeder highways of the third classification, which are practically speaking any roads or streets within municipalities or metropolitan areas which are not on the Federal Aid highway system.

In order to carry out the quoted provisions of the Emergency Relief Appropriation Act of 1935, we now respectfully request your opinion on the following questions:

1. Has the State Highway Commission the authority to establish, lay out, construct, improve and maintain public highways in the State of Montana, other than State or State Federal Aided highways?

2. Has the State Highway Commission the authority to expend certain parts of its revenue accruing to the State Highway Fund for the purpose of establishing, laying out, constructing, improving and maintaining public highways other than State or State Federal Aided highways in the State of Montana?

3. After the State Highway Commission has designated certain highways as State or State Federal Aided Highways in its records, has it the authority to later withdraw their designation as State or State Federal Aided highways in its records, where said highways have not been constructed, improved or maintained as State or State Federal Aided highways?

I have carefully examined into the three propositions propounded in your letter, and beg leave to advise you that all must be answered in the affirmative. As bearing upon the first proposition, the pertinent portion of Sec. 1797, R. C. M. 1921, provides as follows: "The State Highway Commission shall have the power, and authority to acquire by purchase or otherwise, necessary rights of way for

state highways, and to lay out, alter, construct, improve and maintain highways in the State of Montana, and to acquire by purchase or otherwise, deposits of road-building materials, and the State Highway Commission shall have the authority to exercise the power of eminent domain in the name of the State for any of the above mentioned purposes."

It will be noted from the foregoing statute that the State Highway Commission has not only authority to secure necessary rights of way for State highways, but has authority to lay out, alter, construct, improve and maintain highways in the State of Montana. The phrase "lay out" as contained in Section 1797, R. C. M. 1921, has been construed by other courts to mean the appropriate expression for locating and the doing of all the series of acts necessary to the complete establishment of a highway. *Foster v. Board of Park Commr's*, 133 Mass. 321; *Hitchcock v. Board of Aldermen*, 121 Mass. 382; *Hough v. City of Bridgeport*, 57 Conn. 290, 18 Atl. 102, 104; *Mansur v. County Commr's*, 83 Me. 514, 22 Atl. 358; *Small v. Eason*, 33 N. C. 94; *Cone v. City of Hartford*, 28 Conn. 362.

That it was not the intention of the legislature to restrict the jurisdiction of the Highway Commission to merely state highways, is shown by Section 1792, R. C. M. 1921, which gives the State Highway Commission authority not only to maintain state highways, constructed by the State, but to maintain "such additional mileage as the commission may deem necessary."

It is obvious from the said statute that the additional mileage deemed necessary by the commission to be maintained, would be on highways other than state highways constructed by the state.

It would appear from the foregoing that the State Highway Commission has the authority to establish, lay out, construct, improve and maintain public highways in the State of Montana, other than state or state Federal Aided highways. Aside from the statutes and authorities heretofore cited to bear out this conclusion, we find greater persuasive argument and authority for answering your first proposition in the affirmative when we

now consider the second proposition stated in your communication.

There seems to be no question but that our legislature intended that the State Highway Commission procure for the State of Montana the full benefit of all Federal Acts granting Federal Aid in the construction of highways in this state. The pertinent part of Section 1788, R. C. M. 1921, provides as follows: "The State Highway Commissioner shall have power, and it shall be his duty to formulate all rules and regulations necessary for the government of the State Highway Commission, and it is hereby authorized to make all rules necessary to comply with the provisions of the Federal Aid Road Act, approved July 11, 1916, and all other Acts granting aid for public highways, and to obtain for the State of Montana the full benefit of such Act."

The pertinent part of Section 13, Chapter 19, Laws of 1927, as amended by Chapter 178, Laws of 1929, provides: "All money so collected and deposited or transferred to said State Highway Fund, shall be used and expended by the State Highway Commission in the construction, reconstruction, betterment, maintenance, administration and engineering on the Federal Highway system of highways in this state selected and designated under the provisions of the Federal Aid Act, approved July 11, 1916, and the Federal Highway Act, approved November 9, 1921, and all amendments thereto, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of highways leading from each county seat in the State to said Federal highway system of Federal Aid roads where such county seat is not on said system, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of such other roads as have been or may be authorized by the Laws of Montana, for the collection and enforcement of this Act; * * *."

A careful reading of these statutes show that Section 13, Chapter 19, Laws of 1927, as amended by Chapter 178, Laws of 1929, does not in any manner limit the provisions of Section 1788, R. C. M. 1921. That the State

Highway Commission is not restricted to procuring federal aid for State highways or in expending money for highways other than state highways, is further borne out by the following sweeping provision found in Section 1791, R. C. M. 1921, which pertinent part reads as follows: "The State Highway Commission is hereby authorized to, for and on behalf of the State of Montana, enter into all contracts and agreements with the United States government or any officer, department or bureau thereof, relative to the construction or maintenance of highways in the State of Montana; * * *."

The foregoing statutes show plainly that our legislature wanted the Highway Commission to have ample authority to procure grants from the United States for the purpose of constructing highways in this state. To hold otherwise might very well result in causing Sections 1788 and 1791, R. C. M. 1921, and Section 19, Laws of 1927 as amended by Chapter 178, Laws of 1929, to become mere nullities. "Such a result would not be in conformity with the elementary rule that statutes must be read together, and, if possible, harmonized." (Shekelton v. Toole County, 97 Mont. 213, 222, 33 Pac. (2d) 531.)

Answering your third proposition, we find that Section 1796, R. C. M. 1921, provides that after the selection of a system of state highways, the highway commission may, after an investigation or hearing, make alterations or additions to the State Highway system, as shall be deemed expedient by the commission, and such alterations and additions shall be entered in writing upon the records and maps of the commission and each county clerk shall be immediately notified to alter his official map or file in accordance therewith. Section 1797, R. C. M. 1921, also provides that the State Highway Commission may not only lay out, construct, improve and maintain highways in the State of Montana, but it may also alter the same. "An alteration *ex vi termini* means a change or substitution, one thing for another, and where it appears that a highway has been altered, discontinuance of the old highway will be implied." (Words and

Phrases, Vol. I, (First Series) p. 365.)

It appears from the foregoing that after the State Highway Commission has designated highways as a part of the State or State Federal Aided highway system in accordance with Sections 1788 and 1796, R. C. M. 1921, the commission has the authority to alter any of the highways therein contained in its records. Because of the discretion placed in the State Highway Commission by Section 1797, R. C. M. 1921, it is my opinion that before the county clerks are notified by the Commission of any change as to the State and State Federal Aided highway system, the commission may change on its own records any alteration of highways which have not been definitely decided upon by said Commission as State or State Federal Aided highways.