

No. 24

**HIGHWAYS — HIGHWAY COMMISSION — FEDERAL
AID—ASSENT—LEGISLATURE**

Held: State Highway Commission has authority to comply with Federal Highway Commission Act of 1940, although such compliance might conflict with Section 2396.2, Revised Codes of Montana, 1935, relating to apportionment of highway funds to districts.

February 17, 1941

Mr. Howard W. Holmes
State Highway Engineer
Helena, Montana

Dear Mr. Holmes:

You have submitted to this office the Federal Highway Act of 1940 for interpretation and ask whether or not the Montana Highway Commis-

sion has the power, either express or implied, to cooperate with the United States Government in projects contemplated under Section 19 of said Federal Highway Act of 1940.

The Montana Highway Commission was created by Chapter 10 of the Extraordinary Session Laws of 1921. Said Chapter 10 was reenacted as Chapter 139 of the Political Code of the Revised Codes of Montana, 1921, and as Chapter 156 of the Political Code of the Revised Codes of Montana, 1935. Section 6 of said Chapter 10 was reenacted as Section 1788 in both the 1921 and 1935 Revised Codes of Montana, and has never been amended or repealed. Said Section 1788 reads 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 of congress, 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 state highway commission is hereby authorized to, and shall, in conjunction with the board of county commissioners of the several counties in the State, designate such public roads in the State as shall be classed as State highways and subject to improvements under the provisions of said federal aid road act of congress, and the State Highway Commission in conjunction with the board of county commissioners shall also formulate necessary rules and regulations for the construction, repair, maintenance and marking of State highways and bridges, and may provide for local supervision in such cases."

Said section is short and concise and specifically shows that the intent of the legislature was to allow the State Highway Commission to formulate all rules and regulations necessary to comply with the provisions of the Federal Aid Road Act of Congress, 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.

Section 10 of the Extraordinary Session Laws of Montana, 1921, was reenacted as Section 1791 of both the 1921 and 1935 Revised Codes of Montana, and has never been amended, added to or repealed. Said Section 1791 reads as follows:

"For and on behalf of the state of Montana, and in conformity with the requirement of section 1 of said act, the provisions of that certain act of congress approved July 11, 1916, known as the federal aid road act and entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' is hereby assented to. 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; and the State Highway Commission for and on behalf of the State of Montana is hereby authorized to do all other things necessary or required to carry out fully the co-operation contemplated by the said act of congress as hereby assented to, relative to the construction and maintenance of roads and highways in the state of Montana."

Section 1791, above quoted, is the only true assent act passed to date by our legislature and as passed allows the Montana Highway Commission, acting on behalf of the State of Montana, to take advantage of any moneys made available by governmental agencies, by and through the Federal Highway Act. Our legislature has not seen fit, or deemed it necessary, to amend or add to Sections 1788 and 1791 since their enactment in 1921, and has at all times since 1921 recognized the powers of the Montana Highway Commission, both express and implied, to cooperate

fully with the governmental agencies under the Federal Highway Act of 1916, as amended.

Section 2396.1 of the Revised Codes of Montana, 1935, divides the State into twelve districts for the purpose of apportioning expenditures from the highway fund. Section 2396.2 provides for expenditure of highway funds in such districts proportionate to the unconstructed mileage of the Federal highway system ". . . provided that nothing in this act shall be construed to conflict with said federal aid highway acts and the rules by which they are administered."

The question, therefore, arises as to whether the Highway Commission may disregard the provisions of Section 2396.2, insofar as they conflict with Section 19 of the Federal Highway Act of 1940.

In Section 1788 of the Revised Codes of Montana, 1935, which we have heretofore set forth at length, attention is particularly directed to the following portion of that section dealing with the authority of the Highway Commission:

" . . . it is hereby authorized to make all rules necessary to comply with the provisions of the federal aid road act of congress, 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."

While Section 1791 of the Revised Codes of Montana, 1935, as we have heretofore pointed out, is the only express assent act by our state to federal aid for highways and refers only to "that certain act of congress, approved July 11, 1916, known as the federal aid road act and entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads and for other purposes,'" our Supreme Court in *State ex rel State Highway Commission et al. v. District Court of the First Judicial District*, 105 Mont. 44, 56, 69 Pac. (2nd) 112, declared:

" . . . our Legislature expressly assented to the conditions on which the federal aid was extended to the State. In addition to the express legislative assent, we have repeatedly confirmed our assent to the provisions of the federal acts mentioned by acceptance of vast amounts of federal funds expended in highway construction in the State, and by our co-operation with the Secretary of Agriculture in carrying out the plans and purposes of Congress."

And in the same case the following pronouncement is found:

"We are entirely satisfied that the Legislature did not intend to enact any law that would prevent the State from joining with the federal government in furthering the highly commendable plans and purposes expressed in the acts of Congress cited above."

That the Legislature had no intention, by the enactment of Section 2396.2, to prevent the State from receiving federal aid is unmistakably shown by the proviso at the end of such section ". . . that nothing in this act shall be construed to conflict with said federal aid highway acts and the rules by which they are administered."

From a review of these statutes, it appears that the continuing purpose of the Legislature has been to secure all of the funds allotted to the State by the Federal Government for road construction.

The problem presented is not without precedent. In the case of *Logan v. Matthews (Mo.)*, 52 S.W. (2nd) 989, the State of Missouri had a statute similar to Section 1788 of our Codes. The conditions required by the Federal Government apparently conflicted with another statute which prescribed the general direction of roads to be constructed and the towns through which they should run. The Supreme Court of Missouri, in disposing of a contention that under the latter statute the authority granted to the Highway Commission under federal aid projects, did not authorize a change in location of highways, said, at page 992:

"If the Secretary of Agriculture is authorized by the Federal Highway Act to require a change in the location of the road as a condition

to granting federal aid, of which there is no doubt, and the state highway commission would refuse to comply with the requirements made, and thus lose federal aid on the road, then the intention of the Legislature would be defeated."

The case of Eargle et al. v. Richland County Permanent Roads Commission, 123 S. C. 368, 116 S. E. 445, is likewise authority for the same position.

In answer to your specific question, therefore, it is my opinion that the Montana Highway Commission has the power to cooperate with the United States Government in projects contemplated under Section 19 of the Federal Highway Act of 1940.

It is to be observed that the State may, in its discretion, refuse proffered federal aid for roads, if it deems conditions imposed by the Federal Government to be unduly restrictive or oppressive.

Yours very truly,

JOHN W. BONNER
Attorney General