

April 28, 1970 (OPINION)

Senator Richard E. Forkner

Chairman, Legislative Council

Committee on Transportation

RE: Roads - Classification - Authority of Highway Department

We acknowledge receipt of your letter of April 21, 1970, requesting an opinion relating to the legality of functional classification of highways and the legal effect of such a classification. You have asked that we reply to the following specific questions:

1. May the State Highway Department engage in a functional classification study of all public roads in North Dakota with or without the cooperation of the counties and cities, and without specific instructions from the Legislature to do so?
2. By administratively classifying all public roads in North Dakota, would there be any changes in jurisdiction over such roads or responsibility for the maintenance thereof?
3. May the Legislature make state collected highway user funds available for expenditures on a road classification of function basis as distinguished from the present allocation, as found in Section 54-27-19, N.D.C.C.?

You have referred us to the provision in Section 17 of the Federal-Aid Highway Act of 1968 wherein the Congress required that the Secretary of Transportation submit to Congress by January 1970 the results of a systematic nationwide functional classification study to be made in cooperation with the State Highway Departments and local governments, such study to give particular attention to highway system categories, rural and urban, according to the functional importance of routes, desirable as one of the basis for realigning federal highway programs to better meet future needs and priorities.

The North Dakota Legislative Assembly apparently recognized that from time to time requirements would be imposed on the State by the federal government, and therefore, to assure that the state would be able to comply, it delegated to the State Highway Commissioner, in Section 24-04-01, N.D.C.C., the authority to do all things necessary to cooperate. We, therefore, answer your first question as follows:

The State Highway Department may cooperate with the Secretary of Transportation in the classification of highways as required by Congress without specific direction from the Legislature that it do so.

We do not hold that the Legislature has directed that the State Highway Department refrain from conducting classification studies.

On the contrary, we direct your attention to some specific duties and authorizations delegated to the State Highway Commissioner which appear to require him to conduct or participate in such studies.

Section 24-02-08, N.D.C.C. gives the commissioner the authority and responsibility for the "coordination of the total highway road and street program . . . including the designation of systems." Section 24-03-01, N.D.C.C. requires the commissioner to prepare and adopt uniform standards. Section 24-03-19, N.D.C.C. authorizes the commissioner to do research on highway development, including the use, organization, financing and other areas deemed advisable. Section 24-03-20, N.D.C.C. authorizes the commissioner to make traffic surveys as may be "needed to measure existing and estimated future street and highway traffic characteristics, such as, origin and destination, volumes, speeds, accidents, congestion, parking pedestrian use of streets and the economic loss caused by inferior traffic facilities, including the preparation of traffic plans and recommendations."

Jurisdiction over and responsibility for the maintenance of the various sections of public highways, roads and streets in North Dakota is not automatically effected in any way by a classification thereof as to function. No legislation has been adopted which dictates the specific sections that shall constitute state highways, county roads, city streets, or township roads. The Legislature has, however, stated in Section 24-01-01, N.D.C.C. that it is its intent "that an adequate and integrated system of roads and streets is essential to the general welfare of the State of North Dakota" and that in the designation of the systems, it was granting broad authority to the State Highway Commissioner and the Boards of County Commissioners, "so that working together, free from political pressure and local interests, they may provide for the state an integrated system of state and county highways". Local officials have had similar authority bestowed upon them by the Legislative Assembly "with respect to the roads under their jurisdiction".

The authority bestowed to designate the various systems of highways, roads and streets is not without limitation. For example, the total mileage which may be placed upon the state highway system has been restricted by Section 24-01-01.2, N.D.C.C., to not exceed 7 percent of the entire road mileage of the state and to not exceed 7,700 miles in length. In Section 24-01-02, N.D.C.C., the Legislature gave the State Highway Commissioner "complete authority to designate, locate, create, and determine what roads, highways and streets shall constitute the state highway system" limiting increases to not over 100 miles in any one calendar year and requiring him to "take into account such factors as the actual or potential traffic volumes, the construction of by-passes and alternate routes, the conservation and development of the state's natural resources, the general economy of the state and communities, and the desirability of fitting such system into the general scheme of the nationwide network of highways". Provided that the Commissioner takes into account the factors itemized by this law, nothing prevents him from also considering additional factors in designating the state highway system, such as functional importance.

Section 24-01-05, N.D.C.C., further authorizes the Commissioner to

designate from time to time, a secondary highway system not exceeding 18,500 miles in length and specifies that the Commissioner may transfer parts of the primary state highway system to such secondary highway system which are "low in standard of improvement and traffic service". We would consider that a functional classification of a highway would of necessity weigh the traffic service that such highway performs and to that extent the designation of a secondary system of highways requires that highways be classified as to their functional importance.

With regard to the designation of city street systems, the Legislature in adopting Section 24-01-04, N.D.C.C., required every municipality of over 5,000 population, to adopt a master street plan, co-operatively with the State Highway Commissioner "which shall insure the proper location and integration of the state highway connections in the total city street plan". In doing so, it is required that they "shall take into account the more important principal streets that connect the residential areas with business areas, and the streets that carry the important rural traffic into and across the city, to insure a system of streets upon which traffic can be controlled and protected, in such a manner as to provide safe and efficient movement of traffic within a municipality". The functional importance of streets, thus, is by statute a factor to be considered in the designation of a street system.

In the designation of the county road system in the various counties of the state, Section 24-05-16, N.D.C.C., specifies that the Commissioner and the Boards of County Commissioners "shall take into account such factors as the actual or potential traffic volumes, the conservation and development of the county's natural resources, the general economy of the communities, and the desirability of integrating such county roads into the general scheme of statewide network of county roads". As indicated above in interpreting Section 24-01-02, N.D.C.C., we reach the same conclusion here, that provided the factors itemized are duly considered, a further consideration of functional importance of roads in the county may be the basis for the designation of the county road system.

From these statutes applicable to the designation of the various systems of highways, roads and streets, we would answer your second question as follows:

Any administrative classifying of public roads by function, which may be made by the State Highway Commissioner or any of the local officials having jurisdiction over highways, streets and roads, without further proceedings in compliance with the laws cited above, has absolutely no effect upon jurisdiction over such roads nor maintenance responsibilities thereon.

For clarification, we deem it necessary to call to your attention a distinction between the rules applicable to state highways, county roads and city streets, and those which apply to township roads. All roads within a township are township roads by virtue of the provisions of Section 24-06-01, N.D.C.C., subject, however, to being superceded by a designation as a part of the state highway system, county road system, or city street. Therefore, township roads are such by statute while others require action by the Commissioner or

local officials pursuant to statutory duty or authority delegated to them by statute.

The distribution and use of highway users revenue such as gasoline taxes and motor vehicle registration fees, are governed by Section 186 and Article 56 of the Amendments to the North Dakota Constitution. The applicable language in Section 186 specifies that all public moneys must be paid over to the State Treasurer and deposited by him to the credit of the State, and shall be paid out and disbursed only pursuant to appropriation first made by the Legislature. An exception is then made to the requirement of legislative appropriation for "the funds allocated under the law to the State Highway Department and the various counties for the construction, reconstruction and maintenance of public roads". It is thus noted that "allocation" rather than "appropriation" of funds for highway purposes is indicated by this provision.

Article 56 of the Constitutional Amendments specifies that certain funds are earmarked for appropriation and use solely for highway purposes and thus by specific provision can be used on any public highway.

Some funds are "allocated" the State Highway Department in Sections 24-02-41 and 39-04-19(1) N.D.C.C., however, the principal highway users funds have been "allocated" by Section 54-27-19, N.D.C.C. This "allocation" is not at the present time made on a basis of functional classification of highways. Federal highway funds likewise are not presently allocated upon a basis of functional classification of highways but upon a formula which considers a state's area, population and total mail route mileage. The Section of the Federal-Aid Highway Act of 1968 which you cited in your request indicated that at least one purpose of requiring a functional classification of highways was to determine the desirability of realigning highway programs on a functional basis.

Assuming that any change in the allocation of highway users' taxes was made within the limitations of Section 186 and Article 56 of the North Dakota Constitution, we would answer your third question as follows:

The Legislature may allocate state collected highway users' funds for expenditure upon any public road on a basis of the functional classification of such roads by an amendment of Section 54-27-19, N.D.C.C.

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