STATE OF OREGON INTEROFFICE MEMO

TO: Governor Atiyeh DATE: January 23, 1984

FROM: Bob Oliver

SUBJECT: Secretary of State Powers

This memo supplements an earlier one with respect to powers of the Secretary of State.

I spoke with Bob Geltz and George Renner. Renner, as you know, is the long-time Administrator of the Secretary of State's Division of Audits.

Renner says a complaint was received that Roy Taylor, a supervisor in the Department of Revenue, had instructed one of his employees to do absolutely nothing during each workday. Renner says they receive numerous complaints that supervisors are inefficient, use poor judgment, etc., but they do not regard these as being within their jurisdiction. On the other hand, if this complant had been true, he believes it would have amounted to misuse of state funds to the same extent as if the supervisor had instructed the employee to perform tasks unrelated to state government.

Renner says the investigating auditor found the complaint was not founded in fact. Consequently, they closed out the matter.

Renner says his Division does not claim authority to investigate complaints other than those which allege outright misuse of state money or property - that is, for example, assigning an employee to an unauthorized task or flatly telling the employee to do nothing.

This case is close to the borderline. I suppose if a supervisor tells an employee to sit with his hands folded, this does constitute improper use of state moneys to the extent the employee is paid for such inactivity. I believe we ought to watch more closely for instances where Secretary of State might assert some authority on grounds that employees are not being used to their full potential, which they would claim (perhaps) constitutes some degree of misuse of state money - but which infringes dangerously on management prerogative.

cc: Gerry Thompson

STATE OF OREGON

INTEROFFICE MEMO

TO: Governor Atiyeh

DATE: January 16, 1984

FROM: Bob Oliver

SUBJECT: Secretary of State Powers

Last December you asked for a memorandum outlining some of the powers of the Secretary of State - particularly in light of assertions that the Secretary of State's office constituted a separate branch of government.

One who reads the Constitution superficially - like one reading only the headlines in a newspaper - could be led to this conclusion. Article IV is entitled, "Legislative Department"; Article V, "Executive Department"; Article VI, "Administrative Department". There follow two Article VII's (one amended and one original), entitled "Judicial Department". This seems to add up to four branches of government.

On closer inspection, one finds Section 1, Article III, which sets out the classic "separation-of-powers" clause in part as follows: "The powers of the government shall be divided into three separate departments, the legislative, the executive, including the administrative, and the judicial". While the framers of the Oregon Constitution - in their editorial designation of articles - might have designated four departments, it is absolutely clear from the specific language just cited that they had in mind only three separate departments or branches, and any references to an "administrative" branch were to be considered as included within the executive.

The next question involves the constitutional authority of the Secretary of State to review the performance of State officials. Section 2, Article VI, Oregon Constitution, says in part: "The Secretary of State . . . shall be by virtue of his office, auditor of public accounts, and shall perform such other duties as shall be assigned him by law." ORS Chapter 297 establishes a Division of Audits within the Secretary of State's office, and specifies in more detail the manner in which audits of State agencies and State-aided institutions and agencies are to be conducted. One who reads this Chapter can see it deals primarily with accountability for public money and property. It does not prohibit the Secretary of State from commenting on the efficiency or good judgment of a public official, but it does not give any legal effect to such comments.

A similar question arose in 1962, and generated a lengthy opinion signed by Attorney General Thornton (researched and drafted by Peter Herman). I reviewed this opinion carefully, but its research and analysis appear sound.

First, the Attorney General ruled that in order to determine what the framers of the State Constitution meant in 1859 by using the term "auditor of public accounts," it is relevant to look at the Oregon Territorial Statutes then in effect, which defined the powers and duties of that official. The opinion held that the constitutional powers of the Secretary of State as auditor of public accounts charged that official with the responsibility of controlling and supervising the State's fiscal affairs - "not only the function of examining claims against the State to determine whether such claims may lawfully be paid but also to examine the accounts of all persons entrusted with the receipt of public money. Further, we construe the power to examine the accounts of public officers entrusted with the receipt of public moneys to include also the power of requiring such officers to account also for the results of the disbursement by them of the public money." OP. ATT'Y. GEN. No. 5378 (1962).

In short, in using the words "auditor of public accounts," the framers intended to give the Secretary of State essentially a bookkeeping function, settling claims against the State for money owing, and making sure that public officials properly accounted for the dollars they handled. There is nothing to indicate an intent to give the Secretary of State a constitutional function of roving throughout State government to evaluate the performance of State officers and employees.

The latter power could be conferred on the Secretary of State by law, if the Legislative Assembly so chose. There may be some statutory language I have missed, but I cannot find any such authorization.

cc: Gerry Thompson
Denny Miles
Pat Amedeo

ORS 330.632, permitting changes in boundaries of administrative school districts in the manner prescribed by ORS 329.730, has a termination date of July 1, 1962.

Turning to your inquiry, it is our opinion that the "controlling statute" is ORS 330.630, as amended. This statute prescribes the procedure for "further reorganization" after the county committee has been dissolved or on July 1, 1962, whichever is earlier. However, as we view it, the procedures prescribed in ORS 329.730, as amended, are not necessarily repealed by implication by the School District Reorganization Act, inasmuch as ORS 330.645, supra (which has not been repealed), expressly permits utilization of prior existing procedures for districts other than administrative school districts, provided the consent of the county committee for reorganization is received. See also Opinions of the Attorney General, 1958-1960, pp. 257, 304; opinion No. 5015, dated September 8, 1960.

Under the provisions of ORS 330.630 (1), the county committees for reorganization are dissolved as of July 1, 1962, but the "functions of the committee shall devolve upon the rural school board."

Repeals by implication are not favored in law. It is also a basic rule in the construction of statutes that all laws are presumed to be consistent with each other, and it is the duty of the courts to harmonize and reconcile laws and to adopt the construction of a statutory provision which harmonizes and reconciles it with other provisions. 50 Am. Jur., Statutes, § 363, p. 367.

Summarizing, it is our opinion that, as to school districts *other than administrative school districts*, the procedures prescribed by ORS 329.730 may be utilized by the rural school board in changing school district boundaries, provided that the rural school board, functioning as the county committee for reorganization, finds that such boundary change is desirable and is not likely to conflict with any contemplated reorganization as required by ORS 330.645.

Second, with respect to school districts *other than administrative school districts*, the rural school board may also utilize the procedure prescribed in ORS 330.630 (2), as amended, if it considers further reorganization necessary, in which event proposed changes shall be submitted to the State Board of Education for approval. If the changes submitted do not affect an administrative school district, the proposal is also required to be submitted to the legal school voters of the districts affected in the manner prescribed therein.

Third, with respect to changes in boundaries of *administrative school districts*, the exclusive procedure after July 1, 1962, is prescribed in ORS 330.630 (2) and (3), which subsections provide for hearings before the rural school board and also an election of school district voters if a remonstrance is filed with such board.

ROBERT Y. THORNTON,
Attorney General,
By Catherine Zorn, Assistant.

Secretary of State's constitutional duty to act as auditor of public accounts includes not only the power of determining the validity of claims against the state but also the power of determining the accountability of public officers for public property intrusted to them or public moneys received or disbursed by them.

The legislature cannot validly confer upon some officer or agency other than the Secretary of State the final responsibility for determining the proper accountability of the various state agencies and officers for the public money or property intrusted to such agencies or officers.

No. 5378 February 1, 1962

Honorable Alfred Corbett, Chairman
Legislative Fiscal Committee

You ask the following questions:

"(1) Is the Secretary of State constitutionally responsible for making independent post audits, and (2) can the Legislature by statute prescribe the function of, and assign responsibility for independent post audits to any officer or agency whose 'post audit' is exclusive or in addition to that performed as a constitutional responsibility by the Secretary of State?"

From the content of your letter it appears that you are concerned with the basic legal question of whether the Secretary of State's constitutional power and duty as "Auditor of public Accounts" extends solely to the audit of claims against the state or whether such power and duty extends also to making so-called "independent post audits," that is, examining all the financial affairs of the various state agencies, including both before and after the authorization of the payment of a claim.

Article VI, § 1, of the Oregon Constitution, creates the office of Secretary of State. The duties of that office, so far as pertinent to your questions,

are set forth in § 2 of Article VI as follows:

"* * * He *shall* be by virtue of his office, *Auditor* of *public Accounts*, and shall perform such *other* duties as shall be assigned him by law. * * *" (Emphasis supplied)

It is a fundamental principle of law that where the Constitution creates an office and prescribes the duties thereof the office cannot be abolished nor the constitutional duties thereof abridged by the legislature. State v. Walton, (1909) 53 Or. 557, 561, 99 P. 431, 101 P. 389; State v. Hastings, (1860) 10 Wis. 525, 531; Wright v. Callahan, (1940) 61 Idaho 167, 99 P. (2d) 961, 966; 67 C.J.S., Officers, § 111, p. 398; 81 C.J.S., States, § 55, p. 975; Opinions of the Attorney General, 1950-1952, p. 139.

The quoted constitutional provision assigns to the office of Secretary of State the general duty of being "Auditor of public Accounts." It is true that the particular duties and powers appertaining to that general duty are not specifically defined or described. However, the framers of the Constitution, by also providing that the Secretary of State, as auditor of public accounts, would perform such "other" duties as might be prescribed by law, must have had in mind and intended that certain duties and powers would flow from the creation of the function of "Auditor of public Accounts" and that such duties would exist prior to and independent of any legislative action. With reference to what constitutional provisions are self-executing, see Ladd & Tilton Bank v. Frawley, (1920) 98 Or. 241, 249-250, 193 P. 916; 16 C.J.S., Constitutional Law, § 54d, p. 162.

Thus, in Trapp v. Cook Const. Co., (1909) 24 Okla. 850, 105 P. 667, 669, the court, construing similar phraseology, held as follows:

"* * * The Constitution does not specifically enumerate the duties and authority of this board; but that it contemplated that some duties should follow its creation, and that certain ones were in the minds of the convention and the people, is manifest from the language of the section cited, which provides that the board *'shall discharge such other duties * * * as may be provided by law.' If certain duties did follow its creation and were not within the minds of the framers of this section of the Constitution, it seems clear to us that the word 'other' would not have been used, but the phrase would have read that the board 'shall discharge such duties * * * as may be provided by law.'* * *" (Emphasis supplied)

In short, our constitutional provisions which create the office of Secretary of State and assign to him the general duty of being auditor of public accounts are to be distinguished from those constitutional provisions of other states which merely create the office and leave to the legislature the power to prescribe or not to prescribe the duties appertaining thereto. See Yelle v. Bishop, (1959) 55 Wash. (2d) 286, 347 P. (2d) 1081, 1086-1087; Lockwood v. Jordan, (1951) 72 Ariz. 77, 231 P. (2d) 428, 432; Torres v. Grant, (1957) 63 N.M. 106, 314 P. (2d) 712, 713. But see, Hudson v. Kelly, (1953) 76 Ariz. 255, 263 P. (2d) 362, 368-369.

Our problem, therefore, is to determine the scope of the duties embraced in the general duty imposed by the Constitution on the Secretary of State to be auditor of public accounts. In view of the authorities first cited, the scope of those duties will necessarily define the limits of legislative action seeking to curtail those duties or to transfer them to another officer.

As noted previously, Article VI, § 2, supra, in imposing upon the Secretary of State the duty to act as auditor of public accounts does not define or describe further that duty. In such circumstances, it is appropriate in order to properly construe this section of the Constitution to consider the territorial laws of Oregon existing at the time of the enactment of the Oregon Constitution by vote of the people on November 9, 1857. See 16 C.J.S., Constitutional Law, § 30, p. 103.

This rule of construction is well stated in the case of State v. Poland, (1921) 61 Mont. 600, 203 P. 352, 353, as follows:

"Primarily the question presented is this: What is meant by the terms 'property of the county' or 'county property' as employed in the Constitution above? *These general rules are applicable:* (1) The presumption will be indulged that the *terms were employed in the sense in which they were used generally at the time the Constitution was adopted* * * * and (2) *the terms will be understood in the light of existing statutes continued in force by Schedule 1 of the Constitution.* * * *" (Emphasis supplied)

And in Wright v. Callahan, (1940) 61 Idaho 167, 99 P. (2d) 961, the court had before it the problem of construing Article IV, § 1, of the Idaho Constitution. This provision created the office of "State Auditor," and further directed that the State Auditor "shall perform such duties as are prescribed by this constitution and as may be prescribed by law." No specific duties, however, were enumerated in the Idaho Constitution for the auditor.

Idaho's constitutional convention was held in 1889. At that time there were in effect §§ 205-222, 1887 R.S., which created an office of "territorial con-

troller" and which prescribed the various duties and powers thereof.

The court held that the constitutional provision creating the office of State Auditor simply incorporated the office of State Controller and its appurtenant powers and duties as set forth in the earlier territorial statutes. Thus the court stated (99 P. (2d) at 965):

"If the territorial office [of comptroller] was not abolished, and further, if the only change the adoption of Section 1 of Article IV [creating the office of State Auditor] worked was a change of name, then and in that case, it follows *the adoption of that section did not change—add any powers and duties to, nor take any from—the office; it simply gave the office a new but synonymous name, and that having been done, lifted it out of the 1887 statute, together with its appurtenant powers and duties, and placed the whole in Section 1, supra.*" (Emphasis supplied)

The territorial statutes of the second session of the Oregon Territorial Legislature, convened at Oregon City on December 2, 1850, contain the first reference to "the Auditor of public Accounts." See, § 1, Article I, of An Act to Regulate the Treasury Department, p. 263, Territorial Laws 1851. These statutes set forth in detail the powers and duties of the State Auditor.

Similar provisions are contained in An Act to Regulate the Treasury Department contained in the Territorial Laws of 1855, p. 451.

Section 1, chapter I of this later Act established a Treasury Department which embraced the offices of the "Territorial Treasurer" and "the Auditor of Public Accounts."

Chapter II, Territorial Laws 1855, pp. 452-453, set forth the general duties of the auditor. Section 1 of this chapter provided as follows:

"*The auditor of public accounts is declared to be the general accountant of the territory, and the keeper of* all public account books, accounts, vouchers, documents, and all papers relating to the accounts and contracts of the territory, and *its revenue, debt and fiscal affairs,* not required by law to be placed in some other office, or kept by some other person." (Emphasis supplied)

Section 2 provided in part as follows:

"It shall be the duty of the auditor to digest, prepare, and report to the Legislative Assembly, at the commencement of each annual session:

"1. A full and detailed statement of the condition of the revenues, and the amount of the expenditures for the last fiscal year;

* * *

"5. A tabular statement, showing separately the whole amount of each appropriation of money made by law, the amount paid under the same, and the balance unexpended.

"6. A tabular statement, showing separately the whole amount of money received into the treasury, from all sources, in the preceding fiscal year; the amount received from each county, and each source of revenue in each county."

Section 3 provided in part as follows:

"It shall be the duty of the auditor:

"1. *To audit, adjust and settle all claims* against the territory, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers or persons;

"2. To draw all warrants upon the treasury for money, except only in cases otherwise expressly provided by law;

"3. To express, in the body of every warrant which he may draw upon the treasury, the particular fund appropriated by law, out of which the same is to be paid;

"4. *To audit, settle and adjust the accounts* of all collectors of the revenue, and other holders of public money, who are required by law to pay the same into the treasury;

"5. To keep an account between the territory and the territorial treasurer;

"6. To keep an account of all debts and credits between the territory and the United States;

* * *

"10. To give information, in writing, to either house of the Legislative Assembly, whenever required, upon any subject relating to the fiscal affairs of the territory, or touching any duty of his office;

"11. To perform all such other duties as may be required by law." (Emphasis supplied)

Finally, §§ 1, 3, 6, 7-9 of chapter III (pp. 454-456) provided as follows:

"Section 1. All collectors of the revenue, and others bound by law to pay money directly into the treasury, *shall exhibit their accounts and vouchers to the auditor, on or before the first Monday in March, in each year, to be audited, adjusted and settled;* and the auditor shall proceed, without any unnecessary delay, to audit, adjust and settle the same, and report to the treasurer *the balance found due.*

* * *

"Sec. 3. All persons having claims against the territory, shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claim shall accrue, and not afterwards. And in all suits brought in behalf of the territory, no debt or claim shall be allowed against the territory, as a set-off, but such as have been exhibited to the auditor, and by him allowed or disallowed; except only in cases where it shall be proved to the satisfaction of the court, that the defendant, at the time of trial, is in possession of vouchers which he could not produce to the auditor; or that he was prevented from exhibiting the claim to the auditor, by absence from the territory, sickness or unavoidable accident.

* * *

"Sec. 6. In all cases of grants, salaries, pay and expenses ascertained and allowed by law,

found due to individuals from the territory, when audited, the auditor shall draw warrants upon the treasury for the amount, in the form used in the treasury department; *but in cases of unliquidated accounts and claims, the adjustment and payment of which are not provided for by law,* no warrant shall be drawn by the auditor or paid by the treasurer, unless the previous appropriation shall have been made by law for that purpose; nor shall the whole amount drawn for and paid under any one head, ever exceed the amount thus appropriated.

"Sec. 7. If any person interested shall be dissatisfied with the decision of the auditor, on any claim, account or credit, it shall be the duty of the auditor, at the request of such person, to refer the same, with the reasons for his decision, to the Legislative Assembly.

"Sec. 8. In all cases where the laws recognize a claim for money against the territory, and no appropriation shall be made by law to pay the same, the auditor shall audit and settle the same, and give the claimant a certificate of the amount thereof, under the official seal, if demanded; and shall report the same to the Legislative Assembly, with as little delay as possible.

"Sec. 9. The auditor shall report to the Legislative Assembly, within ten days after the commencement of each regular session, a list of all collectors of the revenue, and other holders of public money, whose accounts remain unsettled for six months after they ought to have been settled according to law, and the reasons therefor." (Emphasis supplied)

It is readily apparent from all the foregoing provisions that the office of auditor of public accounts as it existed in the territorial statutes immediately prior to and at the time of the enactment of the Oregon Constitution was the office charged with the control and supervision of the general fiscal affairs of the territory. In exercising this general duty the auditor performed two basic functions, namely, (1) the audit, adjustment and settlement of *claims* against the territory (see subsection 1, supra, of § 3 of chapter II) and (2) the audit, adjustment and settlement of the *accounts* of all persons collecting or otherwise holding the public money (see subsection 4, supra, of § 3 of chapter II).

In this regard we note that the terms "audit," "adjust," and "settle" were used to apply to both the examination of *claims* against the territory and the examination of the *accounts* of those persons intrusted with the public money. Compare, subsections 1 and 4 of § 3, chapter II, supra.

Also the term "account" in the territorial statutes was used to refer to claims against the territory as well as to the debit and credit balances of holders of the public money. Compare, §§ 3 and 6 of chapter III. In this regard it is noteworthy that the term "account" is also used in the plural in Article VI, § 2, supra.

In regard to the foregoing, former Attorney General George M. Brown in an opinion dated May 10, 1918, to John M. Carkin, Consolidation Commissioner, said:

"* * * It is a historical fact that many *members of the Oregon constitutional convention were statesmen of great ability and lawyers of much learning, wide experience and preeminently qualified to draft a constitution.* Nor is there any question but that the men who prepared the bill defining the duties of Secretary of State, *knew the meaning of the provision, that he, the Secretary of State, 'shall by virtue of his office be auditor of public accounts.'* " (Emphasis supplied)

To paraphrase the above quotation, we think it reasonable to presume that the knowledgeable drafters of the Constitution were familiar with the office of "Auditor of public Accounts" as defined by the territorial statutes existing at that time, as well as the duties and powers appertaining thereto.

In our opinion the basic functions and powers of auditing claims and accounts in the territorial statutes were incorporated by Article VI, § 2, supra, which directed the Secretary of State to act as "Auditor of public Accounts." Wright v. Callahan, supra, 99 P. (2d) 961, 965; State v. Poland, supra, 203 P. 352, 353; 16 C.J.S., Constitutional Law, § 30, p. 103.

To summarize at this point, it is our opinion that the constitutional powers and duties of the Secretary of State as auditor of public accounts in general charge him with the responsibility of controlling and supervising the state's fiscal affairs, and this responsibility includes not only the function of examining claims against the state to determine whether such claims may lawfully be paid but also to examine the accounts of all persons intrusted with the receipt of public money. Further, we construe the power to examine the accounts of public officers intrusted with the receipt of public moneys to include also the power of requiring such officers to account also for the results of the *disbursement* by them of the public money.

Our conclusions are in accord with Boyd v. Dunbar, (1904) 44 Or. 380, 382, 75 P. 965, where the court stated that:

"Under the constitution and laws, the Secretary of State is the auditor of public accounts, and charged with the duty of superintending the fiscal concerns of the State: Const. Or. Art. VI, § 2; B. & C. Comp. § 2397 * * *"

and with the definitions contained in State v. Brown, (1882) 10 Or. 215, 222, where the court quoted with approval the following definitions of auditor:

"* * * Abbott defines the powers of such an officer as follows: 'An officer of government, whose function it is to examine, verify and approve or report accounts of persons who have had the *disbursement of government moneys, or have furnished supplies for government use.*' * * *

"Burrill's definition of the term 'auditor' is this: 'An officer or person whose business is to *examine and verify the accounts of persons entrusted with money.* A person appointed to *examine a particular account and state or certify the result; in doing which he is said to audit the account.*' * * *" (Emphasis supplied)

We turn specifically now to answering your first question, which is whether the Secretary of State is constitutionally responsible for making "independent post audits."

We will not attempt to answer your question in the terminology you have used. We can only point out that the Secretary of State's constitutional functions of determining the validity of the claims against the state and settling the accounts of public officers intrusted with the disbursement and receipt of the state's money, in our opinion, span the whole spectrum of state transactions from the approval of expenditures (auditing claims) to determining the accountability of public officers for public money disbursed by them (after a proposed expenditure is approved) or received by them in the course of carrying out their official functions.

In performing these constitutional duties the Secretary of State must determine not only what property the officer is holding for the benefit of the state, but also whether the officer has collected all the money which the law clearly requires the officer to collect and that the officer can account for all of said money.

How this constitutional responsibility is performed is, of course, within the discretion of the Secretary of State. While the legislature may prescribe duties "other" than those prescribed by the Constitution, the legislature cannot prescribe duties which conflict with those duties either expressly or impliedly prescribed by the Constitution. Wright v. Callahan, supra, 99 P. (2d) 961, 965.

Thus, when, how often, and to what extent the Secretary of State during the state's fiscal year (see ORS 291.552) audits the fiscal affairs of the various state agencies in order to determine whether the agency in question can account for all state property with which it has been intrusted, whether money or property, is, in general, the sole constitutional responsibility of the Secretary of State. See ORS 297.210.

Accordingly, to the extent that the Secretary of State's exercise of this discretion covers the same ground mentioned in your so-called "independent post audit" your first question must be answered in the affirmative.

Your second question is whether the legislature can prescribe the functions of and assign the responsibility for the so-called "independent post audits" to any officer or agency whose "post audits" would be exclusive of or in addition to that constitutionally required to be performed by the Secretary of State.

We interpret your second question to be whether some officer or agency other than the Secretary of State can be given the final responsibility for determining the proper accountability of the various state agencies and officers for the public money or property intrusted to such agencies or officers.

In State ex rel. Crawford v. Hastings, supra, 10 Wis. 525, 530-532, the court held, under a constitutional provision which created an auditor of public accounts but which did not prescribe the duties therefor:

"* * * The result is, that we have two auditors instead of one, both of whom must act in succession, before any business can be transacted. *The question arises whether, under the foregoing provision of the constitution, the legislature have the powr to create a second auditor or officer authorized to perform the same duties, whose concurrence is necessary before the acts of the constitutional auditor shall take effect. We think they have not, and that the functions of that officer cannot, in whole or in part, be transferred to, or be exercised concurrently, or otherwise, by any other person or officer.* It falls directly within the rule that the express mention of one thing implies the exclusion of another. *Expressio unius est exclusio alterius.*

"This rule applies as forcibly to the construction of written constitutions as other instruments. And if its observance ought in any degree to depend upon the character or importance of the instrument under consideration, then no other cases demand so rigid an adherence to it. A constitution being the paramount law of a state designed to separate the powers of government and to define their extent and limit their exercise by the several departments, as well as to secure and protect private rights, no other instrument is of equal significance. It has been very properly defined to be a legislative act of the people themselves in their sovereign capacity; and when the people have declared by it that certain powers shall be possessed and duties performed by a particular officer or department, their exercise and discharge

by any other officer or department, are forbidden by a necessary and unavoidable implication. *Every positive delegation of power to one officer or department, implies a negation of its exercise by any other officer, department or person. If it did not, the whole constitutional fabric might be undermined and destroyed. This result could be as effectively accomplished by the creation of new officers and departments exercising the same power and jurisdiction, as by the direct and formal abrogation of those now existing.* And, although the exercise of this power by the legislature, is nowhere expressly prohibited, nevertheless they cannot do so. *The people having in their sovereign capacity exerted the power and determined who shall be their auditor, there is nothing left for the legislature to act upon.* This principle or rule of construction of constitutions, has been often laid down and acted upon by courts. It is fully sustained by the following cases recently decided by the court of appeals of New York. *Barto vs. Himrod,* 4 Seld., 483; *Sill vs. The Village of Corning,* 15 N.Y., 297; *People vs. Draper,* id., 532." (Emphasis supplied)

In view of this case and our answer to your first question, your second question as we have interpreted it must be answered in the negative.

ROBERT Y. THORNTON,
Attorney General,
By Peter S. Herman, Assistant.

Senate Bill No. 510 of the 1961 session of the Oregon legislature violates Article IX, § 3, and Article XI, § 7, Oregon Constitution, by providing free relocation for certain utility facilities at the expense of the State Highway Commission.

No. 5379 February 1, 1962

Mr. Richard L. Kennedy
Executive Secretary
Legislative Interim Committee on
Local Government

You have requested on opinion which will set forth what changes, if any, would be necessary to meet the constitutional questions raised by the Governor in his veto of Senate Bill No. 510 of the 1961 session of the Oregon legislature.

Initially, of course, it is necessary to analyze the constitutional objections. The pertinent provision of Senate Bill No. 510 which has given rise to these objections reads as follows:

"Section 1. (1) Subject to such reasonable rules and regulations with respect to location, construction or repair as the State Highway Commission prescribes under ORS 374.310, any domestic water supply corporation operating under ORS chapter 264 or any sanitary district or authority operating under ORS chapter 450 may install or maintain its facilities in or on the right of way of a state highway.

"(2) When relocation, reconstruction, maintenance or repair of a state highway requires relocation of facilities placed or maintained in or on the highway under subsection (1) of this section, the State Highway Commission shall pay the corporation, district or authority whose facilities are so required to be relocated the reasonable expenses of relocation."

The objections to the above provisions as stated by the Governor are:

(1) Such use of highway funds violates Article IX, § 3, Oregon Constitution.

(2) It would be lending the credit of the state contrary to Article XI, § 7, Oregon Constitution.

(3) The classification of persons benefiting from this bill is arbitrary and discriminatory.

Article IX, § 3, Oregon Constitution, provides as follows:

"No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied. The proceeds from any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles, and *the proceeds from any tax or excise* levied on the ownership, operation or use of motor vehicles *shall*, after providing for the cost of administration and any refunds or credits authorized by law, *be used exclusively* for the construction, reconstruction, improvement, repair, maintenance, operation, use and policing of public highways, roads and streets within the state of Oregon, including the retirement of bonds for the payment of which such revenues have been pledged, and also may be used for the acquisition, development, maintenance, care and use of parks, recretional, scenic or other historic places and for the publicizing of any of the foregoing uses and things." (Emphasis supplied)

The State Highway Department and highway system are operated and maintained through taxes levied upon vehicle fuel and ownership or use of motor vehicles as provided in Article IX, § 3. With respect to this fund ORS 366.505 (2) provides:

"The highway fund shall be deemed and held as a trust fund and may be used only for the purposes authorized by law and hereby is continually appropriated for such purposes."

The purposes authorized in Article IX, § 3, do not include the expenditure set forth in § 1 (2) of Senate Bill No. 510. The legislature in passing such a provision would thus be contravening the constitutional limitation in Article IX, § 3.

In opinion No. 5211, dated May 1, 1961, this office stated that House Bill