Mr. N. F. Schafer
Acting Executive Director
Indiana State Highway Commission
100 North Senate Avenue
Indianapolis 4, Indiana

Dear Mr. Schafer:

This is in reply to your request for my Official Opinion in answer to the following question:

"Is the Indiana State Highway Commission acting in its official capacity and in the performance of its duties in the recording of descriptions of right of way pursuant to Section 1 of the Acts of 1939, Chapter 139, Page 674; Section 36-2940 Burns' Repl. 1949 subject to provisions of Chapter 204 of the Acts of 1963 and required to pay the recording fees set out therein?"

The first act to which you refer is one concerning the recording of descriptions of rights-of-way or easements required for state highways. This act, which is Acts of 1939, Ch. 139, Sec. 1, as found in Burns' (1949 Repl.), Section 36-2940, reads as follows:

"Whenever any right-of-way or easement for any state highway is acquired, an accurate description of all such rights-of-way and easements shall be filed by the state highway commission in the office of the recorder of the county in which such real estate is located, and such description shall be recorded in the deed records of said county, and no fee shall be charged by recorders for such filing and recording."

The other statute referred to in your question and which might seem, at first glance, to conflict with the above-quoted act is the Acts of 1955, Ch. 322, Sec. 1, as last amended by the Acts of 1963, Ch. 204, Sec. 1, and as found in Burns' (1963 Supp.), Section 49-1308a. This act requires the recorders of various counties of this state, on behalf of their respective counties, to tax and collect the fees and amounts set out in
the act for recording various instruments and for performing certain services. After setting out a schedule of fees to be taxed and collected the statute reads as follows:

“That notwithstanding any provisions to the contrary the recorders of the various counties of this state shall, on behalf of their respective counties, tax and collect, upon proper books to be kept in their offices for that purpose, the fees and amounts provided herein on account of services rendered by said recorders. The fees and amounts so taxed, which shall be in full for all services of the recorder, shall be designated as ‘Recorder’s Cost’: Provided, That they shall not belong to or be the property of the recorder, but shall belong to and be the property of the county and shall be paid into the county treasury at the close of each calendar month * * *”

In order to answer your question, it is necessary to determine the effect of the Recorders’ Fee Act upon the sovereign rights and duties of the State of Indiana, for it is a general rule that neither the state government nor its agencies are considered to be within the purview of a statute unless an intention to include them is clearly manifested. Thus, the general rule is stated in 82 C. J. S. Statutes, § 317, as follows:

“The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.

“This general doctrine applies, or applies with special force, to statutes by which prerogatives, rights, titles, or interests of the government would be divested or diminished, or to statutes under which liabilities would be imposed on the government. Although the rule with respect to the exclusion of the sovereign is less stringently applied where the operation of the law is on the agents or servants of the government rather than on the sovereign itself, it also applies where a
reading which would include public officers in the operation of the statute would work obvious absurdity, as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm. Since congress has knowledge of these rules, the fact that a statute does not use clear and specific language making it applicable to the United States indicates that congress did not intend the act so to apply."

The basis of this doctrine was simply stated in State ex rel. Williams v. Glander, State Tax Comr. (1946), 80 Ohio App. 527, 69 N. E. (2d) 226, 227, where the court stated the following:

"* * * The doctrine seems to be that a sovereign state, which can make and unmake laws, in prescribing general laws, generally intends thereby to regulate, not its own conduct, but that of its subjects * * *"

In the case of State v. City of Milwaukee et al. (1911), 145 Wis. 131, 129 N. W. 1101, 1102, the Supreme Court of Wisconsin held that an action by the state against the county or city may be brought without complying with the statute as to claims against counties or the charter provisions as to claims against cities. The court concluded as follows:

"* * * The above statutes either expressly or by necessary implication do not refer to the state, and it is a general rule that such statutes in general terms do not bind the state. Milwaukee v. McGregor et al., 140 Wis. 35, 121 N. W. 642; United States v. Hoar, 2 Mason, 311, Fed. Cas. No. 15,373; Jones v. Tatham, 20 Pa. 398; Endlich on Interp. of Statutes, § 161; Cole v. White County, 32 Ark. 45; Gilman v. Sheboygan, 2 Black. 510, 17 L. Ed. 305.

"In Jones v. Tatham, supra, the court said (page 411): 'Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the
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sovereign; and, when the rights of the commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied.' No reason is perceived why the foregoing rule should not apply to the instant case, and, if so, the state was not obliged to pursue its remedy in the manner indicated by the statutes above referred to, but could maintain an action directly against the municipalities charged with detaining the money. The rule is of ancient origin, and based upon the idea that the crown is not bound by a statute unless named in it, and that the law is prima facie presumed to be made for subjects only * * *

Based upon the same reasoning it is generally held that costs of a legal action may not be awarded against a state or its agencies in legal actions to which it or its agencies are parties unless a statute expressly or by necessary implication provides otherwise.

81 C. J. S. States, § 234.

Several Opinions of this office have examined the foregoing principals of law and have concluded that the State of Indiana is not required to pay costs and fees where the statutes of the state do not specifically require such payment. In 1947 O. A. G., page 32, No. 10, the Honorable Cleon H. Foust concluded that the State of Indiana, in condemnation proceedings, is not liable for ordinary court costs where such costs are for the payment of services performed by officers of the court.

In 1945 O. A. G., page 233, No. 51, the Honorable James A. Emmert was asked whether the Secretary of State was required to pay a fee to the county recorder for filing certificates of revocation of admissions of foreign corporations admitted to do business in the State of Indiana. After noting that the law required the filing of such revocations by the Secretary of State, the Opinion concluded as follows:

"In the absence of legislative provision that the state should pay recording fees, we have recourse only to the common law and cases decided in Indiana. It has long been decided both at common law and under our statutes that the state is not liable for costs."
Henderson v. State, *ex rel.*, Baldwin (1884), 96 Ind. 437, at 444;

*Ex parte* Fitzpatrick (1909), 171 Ind. 557 at 559, where the court says:

"'The policy of the law and the express provision of the statute are against the taxation of costs to the State.'

Those Indiana decisions exemplify the common law rule that the public pays no costs.

See: 34 American Jurisprudence, p. 22.

The policy of the law which does not permit assessment of costs against the sovereign in the absence of express statutory provisions therefore would seem to apply equally to the taxation of fees, particularly where those fees become the property of the state or a subdivision thereof. As stated in 42 L. R. A. at p. 44:

"'Fees cannot be taxed against the state except where authorized by statute, * * *.'

"It is, consequently, my opinion that the secretary of state, while acting for and on behalf of the state, is not liable for any fee for the filing of a certificate of revocation of admission to do business in Indiana. That conclusion, however, I desire to limit to the particular statute involved, since there may be instances where fees are authorized by statute or where the public official is not carrying out a mandatory duty in behalf of the state.

See: *Ex parte* Fitzpatrick, *supra*.

See also: 1925 O. A. G., page 419;
1933 O. A. G., page 34.

There is no question that it is the duty of the State Highway Commission through its officers and employees to record rights-of-way or easements acquired for highways in order to protect the rights, titles and interest of the State of Indiana. It has been recently held by our Supreme Court that the purchaser of land subject to unrecorded rights-of-way or
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Easements is not affected by the interest of the state if he has no notice of the servitude and further that such purchaser is not required to check the files of the State Highway Commission in order to ascertain the nature and description of the interest of the state.

State of Indiana et al. v. Young et al. (1958), 238 Ind. 452, 151 N. E. (2d) 697;


I would further note that language similar to that which appears in Burns' 36-2940, supra, stating that no fee shall be charged the state by recorders, has been held by a court in another state to be superfluous since, in the absence of express statutory provision, there are no exceptions to the rule that the state is not liable for costs.

State v. LaPlata River & Cherry Creek Ditch Co. (1937), 101 Colo. 368, 73 P. (2d) 997.

Based upon the above authorities it is my opinion that, since the provisions of Burns' 49-1308a, supra, do not contain express language requiring the State of Indiana to pay the fees set out therein, the Indiana State Highway Commission in recording rights-of-way or easements as required by law is not obligated to pay a recording fee.

OFFICIAL OPINION NO. 17

March 31, 1964

Hon. C. Wendell Martin
State Senator
920 Circle Tower Building
Indianapolis, Indiana

Dear Senator Martin:

This is in reply to your recent request for an Official Opinion upon the questions contained in your letter which read as follows: