

No. 69

STATE WATER CONSERVATION BOARD—LANDS—
OIL AND GAS

Held: Where State Water Conservation Board has acquired lands which the Board has now determined are no longer needed for the purpose of the Act, then the Board may sell, lease, rent or lease for oil and gas production.

April 3, 1941.

Honorable Sam C. Ford, Governor
Chairman of Water Conservation Board
State Capitol
Helena, Montana

Dear Governor Ford:

The question has been submitted whether the State Water Conservation Board has the power and authority to lease lands owned by said Board for oil and gas production, where it has been found and determined by the Board such lands are not necessary or of any use to any "project" or the "works" managed or operated or jointly operated under the Board's authority.

In answering your inquiry, we turn to Chapter 35, Volume 1, Revised Codes of Montana, 1935, and find the Legislature created the State Water Conservation Board, designating the membership of the Board and granting the Board full, broad, plenary powers for the purposes set forth in the Act:

"Section 349.23. **Board a Body Corporate.** The State Water Conservation Board shall be a body corporate and politic with perpetual existence, and as such, it shall be deemed to be an agency of the State of Montana."

This designation gives to the State Water Conservation Board the status of a public corporation.

Section 349.3, Revised Codes of Montana, 1935, provides in part as follows:

"There is hereby created a board to be known as the 'State Water Conservation Board,' and by that name the Board may sue and be sued, plead and be impleaded, and contract and be contracted with. . . . The Board shall have and adopt a seal bearing its name, which seal shall be affixed to such records and other instruments as it may direct, and all courts shall take judicial notice of said seal. It is authorized to adopt from time to time, as necessary or expedient, suitable rules and regulations for the administration of this act. . . ."

Under Section 349.4, Revised Codes of Montana, 1935, the Board has been granted the power to purchase lands, exchange the same and exercise the power of eminent domain as follows:

"The Board shall have power to acquire by purchase, or exchange upon such terms and conditions and in such manner as it may deem proper, and to acquire by condemnation in accordance with and subject to the provisions of any and all existing laws applicable to the condemnation of property for public use, any land, rights, water rights, easements, franchises and other property deemed necessary or proper for the construction, operation and maintenance of such works. Title to property purchased or condemned shall be taken in the name of the Board." (Emphasis mine.)

In the far-flung statewide operation of the Water Conservation Board, it is to be expected some lands acquired by said Board for use by or in connection with the "works" or "projects," or some of them, will be later found to be of no use or benefit and not needed with such "works"

or "projects." To take care of such circumstances, the Board has been granted by the last paragraph of Section 349.12, Revised Codes of Montana, 1935, the following power:

"The Board is empowered to sell or otherwise dispose of any rights of way, easements or property when it shall determine that the same is no longer needed for the purposes of this Act, or to lease or rent the same or to otherwise take and receive the income or profit and revenue therefrom. All income or profit and revenue of the works and all money received from the sale or disposal of water, use of water, water storage, or other services, and from the operation, lease, sale, or other disposition of the works, property and facilities acquired under the provisions of this Act, shall be paid to the credit of the appropriate water fund." (Emphasis min.)

It might be questioned that the broad powers granted to the Water Conservation Board are a delegation of legislative power; but with this contention, I do not agree. I quote from *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392, which was quoted with approval in *State ex rel. Normile, et al., v. Cooney*, 100 Mont. 391, 403, 47 Pac. (2nd) 637:

"While the power to make laws may not be delegated to a board or commission, . . . a certain policy or rule having been prescribed by statute, matters of detail in carrying out the executive duty of giving effect to the legislative will may be left to board or commissioners."

In the case of *Chicago, etc., Ry. Co., v. Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162, after an exhaustive review of the authorities, the Court said:

"We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative officer or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to be done are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power."

From the Federal Court we quote the following:

"We have no quarrel with the theory that the Congress should have and has the constitutional power to regulate the manner in which the property of the United States shall be handled by the executive branch, but we do maintain that in the exercise of that power it may, by appropriate legislative authority, delegate officers of that department to handle government property in an unrestricted way and in accordance with a vested discretion."

United States v. Mammoth Oil Co., 5 Fed. (2nd) 330.

I am therefore of the opinion the State Water Conservation Board has the power and authority to sell or lease, or lease for oil and gas production any of the land it now owns; provided, of course, the Board determines such lands are no longer needed for the purposes of the Act. If the Board does sell or lease for oil and gas production any of the lands mentioned, all income or profit and revenue derived from such sales or leases must be paid to the credit of the appropriate water fund involved.

Sincerely yours,

JOHN W. BONNER
Attorney General