

Opinion No. 72

State Engineer—State Water Conservation Board—Carey Land Act Board.

- Held:**
- 1. The State Water Conservation Board may select any qualified engineer as its chief engineer and although the State Engineer is ex officio a member of the State Water Conservation Board, he need not be the Chief Engineer for the Water Conservation Board unless the Board so prescribes.**
 - 2. The State Water Conservation Board has the authority to assign duties to the State Engineer in addition to his regular duties as State Engineer, and to pay an additional salary for such duties when they are performed by the State Engineer.**

November 29th, 1949.

Mr. R. J. Kelly
Assistant Secretary
State Water Conservation Board
Helena, Montana

Dear Mr. Kelly:

You have requested my opinion as to the duties of the State Engineer insofar as the activities of that office pertain to the State Water Conservation Board. Your specific questions are as follows:

1. Can the Board select any qualified engineer as its Chief Engineer or is the State Engineer, by virtue of his appointment to that office, automatically designated as the Chief Engineer of the Board?
2. In connection with the exercise of its powers as provided for in the State Water Conservation Board Acts, does the Board have the authority to assign duties to the State Engineer and compensate him at an agreed rate for such duties, in addition to the salary fixed by Section 1958, Revised Codes of Montana, 1935?

The office of the State Engineer was created in conjunction with legislation passed in 1903 establishing the Carey Land Act Board. The Carey Land Act Board was established for the purpose of enabling the State of Montana to accept the offer of the United States of America as set forth in the Carey Land Act. The Carey Land Act provided that the separate states be furnished with Federal assistance for the reclamation of arid lands.

The chief duties of the State Engineer as set forth in Section 1955, Revised Codes of Montana, 1935, are in connection with the waterways of the State, the needs of the State insofar as irrigation matters are concerned, and in the preparation of interstate compacts with other states and with the United States governing the use, distribution and allocation of the water of streams flowing in or out of the State of Montana.

The State Water Conservation Board was established by Chapter 35, Laws of the Extraordinary Session, 1933. Chapter 35, *supra*, is now contained in Sections 349.1 through 349.38, Revised Codes of Montana, 1935. Section 349.3 provides that the State Engineer shall be a member *ex officio* of the State Water Conservation Board. No doubt the legislature placed the State Engineer upon the Water Conservation Board because they realized that by virtue of his duties with reference to the Carey Land Act Board the State Engineer would be conversant with the waterways and water problems of the State of Montana.

Your first question inquires as to whether the State Engineer must be the Chief Engineer for the Water Conservation Board or may the Board select an engineer to act as Chief Engineer. The pertinent statutory provision relative to the duties of the State Engineer insofar as the Water Conservation Board is concerned is that portion of Section 349.3, *supra*, which read as follows:

“ . . . The State engineer shall exercise such powers and perform such duties, in addition to his regular duties as State Engineer and as the Board shall prescribe, and may receive and be paid such additional salary for such additional duties as may be fixed by the Board.”

While the above quoted provision contemplates that the Board may see fit to place duties upon the State Engineer over and above his obligations as an ordinary member of the Board, the nature of such duties and the question of entrusting them to the State Engineer is left in the sound discretion of the Board. If the Water Conservation Board should decide to place such additional duties upon the State Engineer the practical aspects of the matter should be carefully studied. It might well be that the duties incumbent upon the State Engineer in connection with the Carey Land Act Board require his undivided attention and that he would have little time at his disposal with which to perform extra duties for the Water Conservation Board.

I have made a thorough search of the remaining Sections of the State Water Conservation Act and nowhere therein do I find any further Section relating to the duties of the State Engineer. In view of the unclouded intendment of Section 349.3, supra, I conclude that the State Engineer need not be the Chief Engineer for the State Water Conservation Board but may be required to perform such duties as the Board in the exercise of its discretion shall place upon him.

The second part of your first question queries whether or not the Board can select any qualified engineer as its Chief Engineer. The following portion of Section 349.29, Revised Codes of Montana, 1935, is relevant with respect to such inquiry:

"In order to effectuate and carry out the declared policy of this act and to enable this State to avail itself of the provisions of the acts of Congress to cooperate with the President of the United States, any department, board or agency thereof, the said board is hereby vested with power and authority to make rules and regulations for the carrying out of the declared policy of this State and the provisions of this act, and to enter into agreements with the President of the United States, any department, board or agency thereof as may be prescribed and to issue "Revenue Bonds" and to accept grants in addition thereto for such projects; execute and deliver such instruments in writing, to undertake a program of public works which may include among other things the following:

(v) To appoint and fix salaries and duties of officers, experts, agents and employees as it deems necessary, to hold office during the pleasure of the Board, as it may require."

Sub-division (v) above quoted, clearly and unequivocally grants to the Board the power to appoint and fix the duties of such personnel as it deems necessary and certainly the Chief Engineer would be included among such personnel.

Your second question is whether or not the Water Conservation Board may assign duties to the State Engineer and compensate him at an agreed rate for such duties in addition to the salary fixed by Section 1958, Revised Codes of Montana, 1935. In answer thereto I refer you to the language of Section 349.3, supra, which I have quoted above with reference to your first question. The pertinent portion thereof is as follows:

". . . The State Engineer shall exercise such powers and perform such duties, in addition to his regular duties as State Engineer and as the Board shall prescribe, and may receive and be paid such additional salary for such additional duties as may be fixed by the Board."

The direction of the legislature, insofar as it is applicable to your second question, could not be more clearly phrased nor the language more cogent than contained in the above quoted passage, and I have no alternative but to answer such question in the affirmative.

It is my opinion that the State Water Conservation Board may select any qualified engineer as its Chief Engineer and that although the State Engineer is ex officio a member of the State Water Conservation Board he need not be the Chief Engineer for the Water Conservation Board unless the Board so prescribes.

The State Water Conservation Board has the authority to assign duties to the State Engineer in addition to his regular duties as State Engineer, and to pay an additional salary for such duties when they are performed by the State Engineer.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.