

VOLUME NO. 35

Opinion No. 38

**COUNTIES — County surveyor's salary; OFFICES AND OFFICERS —
County surveyor, salary or fee. Section 25-235, R.C.M. 1947.**

**HELD: A county with a total registered vote of less than 20,000 at the
last general election cannot pay the elected county surveyor a
salary or fee that exceeds \$12.00 per day, unless the surveyor
is directed to perform road and construction inspections.**

November 21, 1973

Mr. Alex C. Morrison
Sanders County Attorney
County Attorney's Office
Thompson Falls, Montana 59873

Dear Mr. Morrison:

You have requested my opinion on the following question:

May a county of the fifth class pay the elected county surveyor a salary

or fee that exceeds the \$12.00 per day provision in section 25-235, R.C.M. 1947?

As county surveyors' salaries are initially based upon county population and not upon property valuation under sections 25-605 and 16-3302, Revised Codes of Montana, 1947, what you are asking, in effect, is:

May a county having a total registered vote of less than 20,000 at the last general election pay the elected county surveyor a salary or fee that exceeds the \$12.00 per day limitation contained in section 25-235, R.C.M. 1947?

Section 25-235, R.C.M. 1947, specifically sets the fees of the county surveyor:

The county surveyor is entitled to receive and collect for his own use the following fees:

For services in making a survey required by any court, or if made for the county by order of the board of county commissioners, the sum of twelve (\$12.00) dollars for each working day and with travel expenses while away from home in the performance of the duties of his office, to be paid out of the contingent fund.

In **Wight v. Board of County Commissioners of Meagher County**, 16 M. 479, 481, 41, P. 271, a county surveyor submitted a claim for expenses in making a survey in excess of the amount set by statute. In holding that a county surveyor was not entitled to expenses in addition to his statutory fee, the court quoted with approval the following language from Mechem's **Public Offices and Officers**, section 862, note 5:

It is a well settled rule that a person accepting a public office with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services.

A county is a political subdivision of the state and is subject to legislative regulation and control. **Yellowstone County v. First Trust & Savings Bank of Billings**, 46 M. 439, 128 P. 596. This legislative control over counties is supreme, except as restricted by the constitution in express terms or by necessary implication. **State ex rel. Wilson v. Weir**, 106 M. 526, 79 P.2d 305. Section 25-235, supra, is thus controlling unless otherwise restricted.

Article XI, section 4 of the Local Government Article of the Montana Constitution provides in pertinent part at subsection (b): "A county has legislative, administrative, and other powers provided or implied by law." Furthermore, case law provides that counties can only exercise those powers expressly granted by the legislature. **State ex rel. State Highway Commission v. Dist. Ct. of 1st Judicial Dist.**, 105 M. 44, 69 P.2d 112.

There is no constitutional provision prohibiting the legislature from setting salaries and fees for county officers. The county does not have any power in Title 16, R.C.M. 1947, to change or increase fees of county officers as determined by the legislature. The fees for county surveyor as set by the legislature are thus controlling and cannot be increased by the county acting through its county commissioners.

However, it should be noted that section 32-2805 allows compensation at the rate of \$33.00 per day plus actual expenses to be paid to the county surveyor or some member or members of the board of county commissioners for the inspection of roads and other construction if he receives no other compensation for that day and is not on an annual salary. A county surveyor must be directed by the board of county commissioners to make such inspection and must meet the particular requirements of section 32-2805, supra, before he is entitled to this compensation.

THEREFORE, IT IS MY OPINION:

A county with a total registered vote of less than 20,000 at the last general election cannot pay the elected county surveyor a salary or fee that exceeds the \$12.00 per day limitation contained in section 25-235, R.C.M. 1947, except when the county surveyor performs inspections of roads and construction pursuant to section 32-2805, supra.

Very truly yours,

ROBERT L. WOODAHL
Attorney General