

**Sewer, Right to Use a Stream As. Stream in City, Used as Sewer. State or County Board, Right to Prohibit Use of Stream as a Sewer. Health, Board Of, Right to Prohibit Use of Stream as Sewer.**

Under a given statement of facts the right of the state board of health to prohibit the use of a stream within the city as a sewer is considered. See Opinion.

September 21, 1911.

Hon. T. D. Tuttle, Secretary,  
State Board of Health,  
Helena, Montana.

Dear Sir:

I am in receipt of your letter of the 15th inst., submitting for the consideration of this office, the power of the board to order the city of Philipsburg, Montana, to refrain from the use of an open stream as a sewer. It appears from the letter of Mr. Geo. O. Burks, which you enclose, that there is a stream flowing through the city of Philipsburg, which is used as and for a sewer, and that for some three blocks this stream is uncovered and runs parallel to the main street of the city at a distance of 125 feet therefrom. I do not understand that any question arises as to the pollution of the waters of this stream, but simply as to the authority of the board to prevent its use as a sewer. The power of boards of health relating to sewer systems of cities and towns is granted by Chap. 66, Session Laws of 1911, and the authority there granted does not confer upon the boards of health the power to order the construction of a sewer system in any city or town. The various boards of health, however, are given authority to abate nuisances affecting the public health.

Sec. 1489, Rev. Codes.

If the use of this stream as a sewer is a nuisance affecting the public health within the meaning of said Section 1489 supra, the local board of health if it is within the city, or the county board of health if it is without the city, has the power to abate such nuisance. The District Court is given the jurisdiction, "of actions to prevent or abate a nuisance." Sec. 6275 Rev. Codes.

Before any order can be made preventing the city or individuals from the use of this stream, it must first be established that it is a nuisance. An action for that purpose and for the purpose of restraining its future use as a sewer may be instituted in the District Court by the local board of health or by any person who is specially injured by such use. The local board of health should investigate the matter and if it is determined that it is a nuisance then action should be instituted for the purpose of suppressing the same. If action is instituted by the local board of health it would probably be advisable to have someone who is specially injured join with the local board as one of the parties plaintiff. If this stream is used as a sewer by reason of authority granted therefor by the city, then the action should be directed against the city. If, however, it is merely used by indi-

viduals without the authority of the city the action should be directed against the individuals so using it, or the action may be directed against both the city and individuals. The question presented so far as determining whether the use of this stream is a nuisance, is wholly a question of fact and should be there determined.

Yours very truly,

ALBERT J. GALEN,

Attorney General.