

Dear Sir:

You have requested an opinion on the following set of facts.

The Water Conservation Board is contemplating the construction of a storage dam in Daniels County, but the Board is unwilling to purchase the property that will be inundated by the waters stored in such dam. Certain public spirited citizens are willing to donate their lands and the county commissioners have signified their willingness to donate county lands if they may legally do so. Other land owners whose property will be inundated are not willing to donate their lands, but are willing to exchange their property for near-by tax title property which is owned by the county, which is of approximately equal value. You wish to know if (1) the county commissioners can exchange county lands for private lands for this purpose, and, (2) if the county can donate lands to the Water Conservation Board, where such lands will be flooded and used only for the storage of water.

You have suggested that Section 2208.1, Revised Codes of Montana, 1935, wherein it is provided:

“The county commissioners may also, after any of said lands have been offered for sale and not sold, when it is deemed for the best interest of the county, exchange said lands for other lands of equal value where the effect of such exchange would be to acquire lands which could be leased or sold to better advantage.”

and Section 4465.9, which is in part as follows:

“Provided, however, if within three years no immediate sale be had of real estate attempted to be sold under the provisions of this section, the Board of County Commissioners may make trades or exchanges of real estate for any lands or real estate of equal value located in proximity to land or tracts of land owned by the county.”

are applicable.

In addition to these two sections, Section 4465.21 provides:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as

Opinion No. 325.

**County Commissioners — Powers and Duties—Lands, Exchange of—
Water Conservation.**

HELD: 1. The County Commissioners may, in their discretion, exchange lands for aiding in the construction of water conservation projects.

2. County Commissioners may not donate lands of the county for any purpose.

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are prescribed by law: To represent the county and have the care of the county property, and the management of the business and concerns of county in all cases where no other provision is made by law."

The Constitution of Montana, Section 15, Article III, makes the use of water a public one, and the case of *Donich v. Johnson*, 77 Mont. 229, says:

"* * * This constitutional provision declares, among other things, that the use of sites for reservoirs necessary for collecting and storing water shall be a public one and should receive a broad construction to the end that flood waters which would otherwise go to waste could be conserved for the purpose of making the arid lands of the state productive." (See also 75 Mont. 401.)

The *Donich* case continues:

"* * * Between irrigating seasons the water of Montana's numerous streams mostly goes to waste, and generally speaking, in high-water time, which usually is in June, tremendous quantities of flood waters run away without serving any useful purpose. The construction and maintenance of secure reservoirs for the conservation of these waters, therefore, is of very high public importance."

Therefore, it is my opinion that because of the mandate implicit in the Constitution that irrigating water be preserved for the benefit of the farmers and land owners of the State of Montana; and because of the great public interest in reclamation of the arid lands of Montana, it is the duty of the county, as a political subdivision of the state, to make every effort to store and preserve irrigation water for the benefit of the citizens of that county, where either feasible or possible.

Therefore, the county commissioners, when in the exercise of their discretion they deem it advisable to exchange lands for aiding in the construction of water conservation projects, may do so. It is further my opinion that the use of county lands for a reservoir to store water is a legitimate use, and that the county commissioners are authorized to de-

vote county lands to that use. However, the county commissioners may not donate county lands, and, therefore, the arrangement with the Water Conservation Board should be one which retains the title to the flood lands in the county, but permits the Water Conservation Board to use the land as a reservoir for the storage of water.