

"3. Would members of the fluid milk industry in areas not entered by the Board be subject to the licenses and assessments set up in the law?"

A provision similar to Section 2639.6 R. C. M., 1935, was held unconstitutional by the Maryland Court in *Maryland Cooperative Milk Producers v. Miller*, 182 Atl. 432, as delegating legislative power "to an indefinite portion of producer, consumer and distributor classes in areas having no legislative description." The proposed amendment which leaves the question of the formation of any market within the discretion of the board, in my opinion is not vulnerable to that attack. We call attention to a late case decided by a federal court: *Highland Farms Dairy v. Agnew*, 16 F. Supp. 575, decided October 3, 1936, upholding the Virginia Milk Control Act, containing a provision similar to the proposed amendment of Section 2639.6. The court held that authority to the milk commission to determine in what areas it should exercise its powers under the Virginia Milk Control Act, did not contradict nor nullify legislative finding as to need of state control nor to constitute improper delegation of legislative power. We call attention to the following language of Circuit Judge Soper, speaking for the court:

"We do not think that the authority given to the Board to determine in what areas it should exercise its powers contradicts or nullifies the legislative finding, or amounts to an improper delegation of legislative power. It is merely left to the Board to ascertain whether trade practices, harmful to the public interest, are prevalent in a particular area, and if so, to exercise the power to make rules and regulations and fix prices for the milk produced and distributed therein. \* \* \*

"There is no impropriety in the legislative delegation of authority to the executive to act or withhold action in carrying out the legislative intent in conformity with principles laid down in the governing law \* \* \*"(Here follows a review and citation of cases.)

The proposed amendment to Section 2639.6, reads:

**Opinion No. 46.**  
**Constitutional Law.**  
**Statutes—Construction.**

HELD: H. B. No. 170 amending Sec. 2639.6 is not unconstitutional as delegation of legislature power.

H. B. 170 amending Sec. 2639.6 gives the Milk Control Board discretion in forming or not forming market areas.

Persons not within market areas are not required to pay license fees and assessments.

February 26, 1937.

Mr. G. A. Norris  
Commissioner, Montana Milk Control Board  
The Capitol

Dear Mr. Norris:

You have submitted the following:

"Your attention is asked to the amendment to the Montana Milk Control Law proposed in House Bill No. 170, section 2639.6, and your opinion is respectfully asked upon the following questions relative thereto:

"1. Will this amendment correct the constitutional weakness of section 2639.6 of the present law?

"2. Is the Board within its proper power in exercising its discretion in entering or not entering a given unorganized market?

"The board, at its discretion, may require the formation in any market of an association organized under regulations satisfactory to the board and not inconsistent with law. \* \* \*

"The board may, at its discretion, administer this Act with respect to markets in communities having a population of less than five hundred (500) under general orders, \* \* \*."

It is my opinion that the legislative intention is clearly expressed in the above to the effect that the board has the power to exercise its discretion in forming or not forming a market in any given community. It is also my opinion that the legislative intention is clearly expressed to the effect that persons not within market areas are not subject to the licenses and assessments set up in the law. Such license fees and assessments are imposed and levied for the purpose of paying the cost of administering the law in the communities where market areas are created and not for the purpose of revenue generally.