

No. 504

COUNTIES—COUNTY COMMISSIONERS—CONTRACTS—SERVICES—ATTORNEYS—SPECIAL LEGAL SERVICES

Held: A county through its board of county commissioners, has no authority, either express or implied, to contract for services for the purpose of securing methods for taxation return or taxation returns from government owned or controlled lands within the county.

October 23, 1942.

Mr. R. F. Hibbs
County Attorney
Yellowstone County
Billings, Montana

Dear Mr. Hibbs:

You have requested my opinion relative to the following facts:

A claim has been presented against Yellowstone County by an attorney at law, for "special legal services in efforts to secure methods for, and taxation returns from government owned or controlled lands in Yellowstone County, including assembling of evidence for submission of Public Lands Committee, United States Senate, on Senate Bills 1201 and 1322" in the amount of \$40.00. The claim was approved by one of the county commissioners. You inquire whether the county has authority to contract for the services above mentioned.

From other sources, I find the situation here involved is as follows:

The State of Montana, under its enabling act and under the Constitution of the United States, has no power to tax federally owned lands. The government, for the past few years, has been acquiring lands in Montana in a proprietary capacity. Eleven states have banded together and formed an association known as the Interstate Association of Federal Land Counties. The association has drafted legislation which has been introduced in the United States Senate as Senate Bill 1201, under the provisions of which, the government will make grants to counties in lieu of taxes in proportion to the amount of federally

owned lands in the county. The individual counties, at the convention of the Montana Association of County Commissioners at Missoula, directed the claimant to bill them for special legal services representing them in this matter.

Section 4441, Revised Codes of Montana, 1935, provides:

"Every county is a body politic and corporated, and as such has the power specified in this code, or in special statutes, and such powers as are necessarily implied from those expressed."

Section 4442, Revised Codes of Montana, 1935, provides:

"Powers, how exercised. Its powers can only be exercised by the board of county commissioners, or by agents, and officers acting under their authority, or authority of law."

The general rule as to the powers of the county commissioners has been expressed by our court in *Lewis v. Petroleum County*, 92 Mont. 563, 565, 17 Pac. (2nd) 60:

"The principle is well established that the board of county commissioners may exercise only such powers as are expressly conferred upon it or which necessarily implied from those expressed, and that where there is a reasonable doubt as to the existence of a particular power in the board of county commissioners, it must be resolved against the board, and the power denied. (Sec. 4441, Rev. Codes 1921; *Helena Light & Ry. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446; *Edwards v. County of Lewis and Clark*, 53 Mont. 359, 165 Pac. 297; *Ainsworth v. McKay*, 55 Mont. 470, 175 Pac. 887; *Sullivan v. Big Horn County*, 66 Mont. 45, 212 Pac. 1105; *Bigness v. Cummins*, 69 Mont. 294, 36 A. L. R. 634, 222 Pac. 797; *Heckman v. Custer County*, 70 Mont. 84, 223 Pac. 916; *In re Hyde's Claims*, 73 Mont. 363, 236 Pac. 248; *State ex rel. Blair v. Kuhr*, 86 Mont. 377, 283 Pac. 758; *Simpson v. Silver Bow County*, 87 Mont. 83, 285 Pac. 195.)"

Section 4444, Revised Codes of Montana, 1935, enumerates the power of a county and as the power to employ a person or persons is not expressly conferred upon the board of county commissioners by the section, we must turn to an examination of other statutes to find the necessary power.

Section 4465.14, Revised Codes of Montana, 1935, provides:

"Direction of law suits. The board of county commissioners has jurisdiction and power under such limitations and restrictions as are defined by law; To direct and control the prosecution and defense of all suits to which the county is a party."

The board of county commissioners has no power to employ counsel under this statute in a case to which the county is not a party.

Williams et al., v. Board of Commissioners of Broadwater County, 28 Mont. 360, 72 Pac. 755.

Section 4486, Revised Codes of Montana, 1935, provides:

"Special counsel to assist county attorney. The board of county commissioners has the power, except in counties of the first class, whenever, in its judgment, the ends of justice or the interests of the county require it, to employ, or authorize the county attorney to employ, special counsel to assist in the prosecution of any criminal case pending in such county, or to represent said county in any civil action in which such county is a party."

This section shows the authority granted to the board of county commissioners is limited. It may employ counsel to assist the county attorney in criminal cases pending in such county, or it may employ counsel where

the county is a party in any civil action. No implied authority can be said to exist to employ counsel for any other purpose than those therein expressed.

It will be seen by an examination of the above statutes and others no express power is conferred upon the board of county commissioners for the purpose herein mentioned.

May the power be said to be implied from those expressed?

Our court has ruled upon the implied powers of a county in several instances. In *Arnold et al. v. Custer County et al.*, 83 Mont. 130, 269 Pac. 396, the court held the board of county commissioners had implied power to enter into a contract with an abstract company to furnish the needed data in obtaining tax deeds from its "tract index." The object of the contract was said to be the "procurement for the county of tax deeds, every step of which is liable to affect title and without good title the county could scarcely expect to sell the property to advantage; . . ." The rule was said to be:

" . . . that a county governing board may contract to have done work that is necessary to its care and management of the business and affairs of the county and the preservation of county property, if it is not made the duty of some county official to do such work."

State ex rel. Blair v. Kuhr, 86 Mont. 377, 283 Pac. 758, was an action in mandamus against the county attorney, to compel him to institute an action against the board of county commissioners to recover money alleged to have been unlawfully expended by it and to restrain further expenditures under the terms of an alleged contract entered into by it. By the terms of the alleged contract, the board had agreed to pay a sum to a company for reclassifying, re-appraising, and revaluing all real property in the city of Havre, together with improvements thereon. The court said the board of county commissioners must necessarily be held to be vested with implied power to enable it intelligently to apply its judgment and discretion when sitting as a board of equalization in performance of the **duty imposed upon it** by the statute to adjust and equalize the assessment of property within the city as made by the assessor in the performance of his independent duty.

In *Simpson v. Silver Bow County*, 87 Mont. 83, 285 Pac. 195, the court held the board of county commissioners had implied power to enter into a contract whereby plaintiff agreed to furnish the commissioners—while sitting as a county board of equalization—information which would enable the board to cause to be "assessed and taxed according to law" a large amount of taxable property which had escaped taxation. The court reiterated the rule stated in *Blair v. Kuhr*, *supra*:

"It seems clear from the authorities, including our own decisions, that it is beyond the power of the county board to enter into a contract for services, the performance of which is cast upon a different official or board, and which has the effect of relieving the other of a duty imposed by law, or of usurping the function of such other official or board. On the other hand, it seems equally clear that, in this state at least, a board of county commissioners has power to contract with an outsider for information in aid of the board in **performing a duty imposed upon it**, so long as the contract is not in violation of the rule last announced, even though, incidentally, the information received, may aid others officials in the performance of their duties, **provided always the grant of power in the particular instance, is to be found in the statutes.** (*Arnold v. Custer County and State ex rel. Blair v. Kuhr*, *supra*.)" (Emphasis mine.)

The facts in the instant case are to be distinguished from the facts in the above cited cases, and thus cannot come within the rules laid down by our court. Nowhere in the statutes can there be found the duty of the board of county commissioners to secure methods for taxation returns

or taxation returns from government owned or controlled lands in the county. No grant of power, either express or implied, can be found for this purpose. No authority can be found to employ special counsel or any other person or persons for this purpose.

Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243, was an action to prevent payment of claim by county treasurer upon a warrant in favor of plaintiff. The claim was for services as special counsel in matters pending before the last session of the legislature, as per contract with the board of county supervisors. Plaintiff had undertaken to defeat a bill in the legislature, the passage of which would have resulted in a loss to the county of a sum of money. The court held the contract void as being against public policy, because it was in violation of the constitutional and statutory provisions against lobbying. The court said:

“ . . . Waiving this, however, and we think the contract alleged in the complaint was in excess of any powers conferred upon the board of county supervisors and hence void . . . In the case at bar the supervisors had no duty in the premises to perform. They had no authority to influence or employ others to influence, the legislature in the action which, in its wisdom, it should see fit to take. If the board could do so in the present case, then, by parity of reasoning, it could do so in all matters of revenue, and in all cases which might indirectly affect the interest of the county. If the board of a given county may exercise such authority, then like boards of all other counties may exercise like authority in like cases, and there is a possibility of a corps of attorneys always in attendance upon sessions of the legislature to influence the action of members in matters confided to the judgment of the latter. There is no such authority given, either directly or by implication, to boards of county supervisors, and the attempt to exercise it by the board in the case at bar was null and void.”

In view of the above cited statutes and cases, it is my opinion the county, through its board of county commissioners, has no authority, either express or implied, to contract for services for the purpose of securing methods for taxation returns or taxation returns from government owned or controlled lands within the county.

Sincerely yours,

R. V. BOTTOMLY
Attorney General