

No. 76

**BOARDS OF COUNTY COMMISSIONERS—IRRIGATION
WATER—WATER RIGHTS—WATER CONSERVATION
BOARD**

Held: Board of County Commissioners, contracting for more water or water rights than are actually needed and required and which can be beneficially used upon land owned by the county or land which is under the jurisdiction of boards of county commissioners, would be acting in excess of its authority, and to such extent act would be unlawful.

April 8, 1941.

Mr. Hugh J. Lemire
County Attorney
Custer County
Miles City, Montana

Dear Mr. Lemire:

You have submitted the following:

“Custer County has heretofore entered into a contract for 1000 acre feet of water with the Tongue River Water Users Association, the chairman of the Board of County Commissioners having affixed his signature to such water purchase contract on August 7, 1937. The said water purchase contract calls for payment of \$1300.00 on November 1, 1939, and a like sum on November 1st of each succeed-

ing year until and including the year 1975, plus operating cost share. Custer County also subscribed to 1000 shares of the capital stock of said Association by the Chairman of the Board of County Commissioners affixing his signature to a subscription and pledge agreement whereby Custer County is to pay \$1000.00 for said shares of stock upon call and demand by the directors of the said Association.

"The question presented is whether the Board of County Commissioners of Custer County has exceeded its authority in expending public funds under the water purchase contract as entered into and also whether it has exceeded its authority by entering into the subscription and pledge agreement whereby Custer County has obligated itself to pay \$1000.00 for 1000 shares of the capital stock of the Tongue River Water Users Association."

It is conceded and recognized by all authority the Board of County Commissioners has only such powers as have been expressly granted to it by the Legislature or which may reasonably be implied from such granted powers.

Our Supreme Court has stated:

"The statutes constitute the charter of a county's power, and to them it must look for the evidence of any authority sought to be exercised."

Edwards v. County of Lewis and Clark, 53 Mont. 359, 366, 165 Pac. 297.

"One who asks payment of a claim against a county must show some statute authorizing it or that it arises from some contract express or implied which find authority of law. In other words . . . no officer of the county can charge it with the payment of other claims, however meritorious the consideration, or whatever may be the benefit the county may derive from them."

20 C. J. S. 1052.

And again:

"We think the true rule is that if the recipient of county money cannot point to some law authorizing him, by reason of his official or contractual relations with the county, to receive such money, the board allowing his claim against the county is liable therefor under the statute."

Pima County v. Anklan, 61 Pac. (2nd) 172 (Arizona).

No doubt the Board of County Commissioners believed such a contract was for the best interests of the county, but our Supreme Court has stated:

"The fact that the contemplated action may be in the best interest of the county is not an admissible argument. The doctrine of expediency does not enter into the construction of statutes."

Franzke v. Fergus County, et al., 76 Mont. 150, 158, 245 Pac. 962.

Our State Constitution provides:

"Section 1 (Article XIII). Neither the State, nor any county, city, town, municipality, nor other subdivision of the State shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the State by operation or provision of law."

"The limit of the power of a public officer is the statute conferring the power, and what further power is necessarily implied in order to effectuate that which is expressly conferred. In the performance of

ministerial duties expressly enjoined, however, when the mode of performance is prescribed, no further power is implied, nor has the officer any discretion."

Ex Parte Farrell, 92 Pac. 785, 36 Mont. 254.

The only powers granted by the Legislature to the Board of County Commissioners in the matters you have raised are contained in Sections 349.37 and 349.38, which sections are as follows:

"349.37. **State Agencies and Board and Counties Authorized to Contract with Water Conservation Board.** The State Land Board and/or the State Board of Examiners and/or the State Board of Education or any other board or agency of the State of Montana and/or boards of county commissioners having jurisdiction over any lands which may require the use of any water or water rights owned or controlled by the State Water Conservation Board or the United States or its agencies, are hereby authorized to enter into such contracts as are necessary with the State Water Conservation Board, the United States, or agencies of the United States, or others, for the purchase of water rights needed for such lands, and may enter into any contracts as necessary or expedient, similar to contracts executed by individuals or others, to secure for the State, state institutions, counties and state school and county lands the benefits of such water or water rights, which obligations may be similar to those of persons who become stockholders in corporations or who may agree to purchase and pay for water for irrigation purposes, which agreements may include agreements that the State and counties shall be subject to the same charges and payments as are other water users within such projects, provided, however, that none of such charges, payments or costs shall constitute a lien against the State's interest in the said lands."

"349.38. **Nature of Obligations.** The obligations provided for in this Act to be incurred upon behalf of the counties and the State shall not be in the nature of general obligations by either said counties or the State of Montana, but shall constitute liens only upon such water or water rights purchased for the benefit of such lands."

It will be noted the boards of county commissioners are authorized to enter into such contracts as are necessary for the purchase of water or water rights which can be beneficially used and which are needed for the lands owned by the counties and lands over which the counties have jurisdiction.

It must be conceded the county—through its board of county commissioners—is not in the business of developing irrigated tracts with canals, diversion ditches and the application of water to the lands, as such a procedure would be taking public money for a special purpose.

As the contract is for 1000 acre feet of water and this water must be applied to land each year to gain any benefit from the contract and the contract continues until 1975, and considering the yearly payment on the contract and the proportionate operating costs to be paid by the county, it becomes apparent that, unless the county through its Board of County Commissioners has jurisdiction or ownership of lands on which this water may be beneficially applied, such a contract would be in excess of the authority granted by the Legislature in Section 349.37, Revised Codes of Montana, 1935, relating to powers given boards of county commissioners.

In dealing with such a question as we have here, we should bear in mind:

"Parties dealing with public officers are bound to know the limits of their powers."

Bank of Lowell v. Cox, 35 Ariz. 403, 279 Pac. 257.

And further:

"Persons dealing with public officers must ascertain whether their

proposed action falls within the scope of their authority.”

Neff v. Redmond, 202 Pac. 925.

It is my opinion the Board of County Commissioners may lawfully enter into such contracts for only such amount of water or water rights as are needed and which can be beneficially used upon, and are required for, land owned by the county or such county land as is under the jurisdiction of the Board of County Commissioners. The contracting by the Board of County Commissioners for any more water or water rights than are actually needed and required and which can be beneficially used upon land owned by the county or land which is under the jurisdiction of the Board of County Commissioners would be in excess of the authority conferred upon Boards of County Commissioners by the Legislature and to such extent would be unlawful.

Sincerely yours,

JOHN W. BONNER,
Attorney General