

**Opinion No. 52****Rural Improvement Districts, Establishment and Maintenance of—  
County Surveyors, Fees of—County Commissioners.**

- Held:**
- 1. The County Surveyor in a County having a total registered vote of 15,000 or over is entitled to fees over and above his regular salary for work performed in the surveying, engineering, and supervision of Rural Improvement Districts. Such services are not a part of the official duties placed upon the County Surveyor by Statute.**
  - 2. The County Surveyor is also entitled to fees for the surveying of private roads and other duties not of an official county nature.**
  - 3. The Board of County Commissioners may exercise their discretion as to the manner of providing for the maintenance of Rural Improvement Districts. The Board need not call for bids from private contractors for such work but may provide for such maintenance in any suitable and proper manner.**
  - 4. The Board of County Commissioners may not authorize the use of County employees and equipment for use in building roads and maintenance of roads and streets, or for improvements on privately owned land if such land is not included in a Rural Improvement District.**

September 7th, 1949.

W. A. Brown, State Examiner  
State Capitol  
Helena, Montana

Dear Mr. Brown:

You have requested the opinion of this office upon the following questions:

"Is it legal for a County Surveyor, who is employed by a County having registered voters of fifteen thousand or over under the provisions of Section 1622.1, Revised Codes of Montana, 1935,

to collect fees for his own use in addition to the said paid salary for services rendered either by himself or a Deputy Surveyor and for an assistant for work for which fees should be paid such as:

1. Surveying, engineering, supervision of Special Improvement Districts created by the County Commissioners.

2. Surveying of private roads and or other duties not of a County nature and not chargeable to the County.

3. In case of County Special Improvement District, we should like to be advised whether or not, when any services are performed by the County Surveyor or any of his assistants that are on the County Payroll, the fees earned should be charged to Special Improvement Districts and credited to County General Fund, from which the salaries had been paid to the County Surveyor and his office personnel employed as County employees, or whether or not these said employees can collect for this kind of fees and retain same for their own use in addition to their salaries paid from the County funds.

4. Is it legal for a County Surveyor, working under the provisions of Section 1632.1, to repair and maintain Special Improvement Districts, to be paid from County funds, after said districts had been created and the work completed by a contractor, even though the County funds from which the expenditures had been made were reimbursed by such amounts as fixed by the County Surveyor by collections or donations from the property owners benefitting by the improvements, or must any new work, repair or maintenance on a completed Special Improvement District and then having the work performed by contracting for same and let by bids after legal calling for bids.

5. Is it legal for Boards of County Commissioners, under their powers, to authorize road building or maintenance of roads, streets, or alleys or improvements on privately owned land for individuals or corporations by County employees, and charging for said work and placing the collections or donations to the credit of the County funds from which expended.

6. Is it legal for either Board of County Commissioners or County Surveyor working under the provisions of Section 1622.1 to make the improvements on Special Improvement Districts created by the Board of County Commissioners by County employees and equipment, and thereby entering into competition with private industry, or must all such work have to be done by contract and let in the manner provided for by calling for bids."

Since all six of your questions deal more or less with the scope of the duties of County Surveyors in conjunction with the creation and maintenance of County Special Improvements Districts (Rural Improvement Districts), it is necessary to determine the statutory duties which the County Surveyor must perform.

Section 1622.1 Revised Codes of Montana, 1935, is the sole statutory provision setting forth the duties of the County Surveyor in counties having a total registered vote of fifteen thousand or over. Section 1622.1 is as follows:

"The County Surveyor of all counties having a total registered vote of fifteen thousand (15,000) or over, at the last general election shall have exclusive control, supervision and direction of all highways, bridges and causeways within his County, and in the exercise of such control, supervision and direction he shall keep all highways, and bridges free and clear of all obstructions; cause highways to be graded, when needed, and maintain and repair the same; cause all bridges and causeways to be made, when needed, and keep the same maintained and in good repair and renew the same when destroyed; **make all surveys; establish grades; prepare plans, specifications and estimates;** keep accurate cost data; approve all claims against the County for all highway, bridge and causeway construction, maintenance and repair prior to presentation to the Board of County Commissioners; employ deputies, men and teams, and discharge at his pleasure such deputies, men and teams, and determine how, when and where such deputies, men and teams shall work; purchase and secure all highway and bridge machinery and machinery equipment and tools to be used upon highways and bridges with the approval of the Board of County Commissioners; from time to time make reports and estimates of all matters relating to highways and bridges when required by the Board of County Commissioners; **perform such other duties as are now or which may be hereafter required by law,** and shall receive an annual salary for performing the duties of said office in the amount of three thousand six hundred dollars (\$3,600) per annum to be paid out of the contingent fund of the County in which he holds office." (Emphasis mine.)

The above quoted section provides specifically for certain enumerated duties of the County Surveyor and also contains the general provision that he shall perform such other duties as are now or which may be hereafter required by law. To determine if the Surveyor is to be paid fees over and above his regular salary for work done in conjunction with the establishment and maintenance of a Rural Improvement District an examination of the statutes creating Rural Improvement Districts must be made to discover if the law places upon the County Surveyor the duty of performing a portion of the work necessary to establish and maintain such a District.

The statutes providing for Rural Improvement Districts are Sections 4574 through 4603, Revised Codes of Montana, 1935, as amended. For the purpose of shedding light upon the possible connection between the duties of the County Surveyor and the necessary acts to be performed in constructing and maintaining a Rural Improvement District I shall set forth portions of these Sections which are pertinent to the subject.

Section 4575, Revised Codes of Montana, 1935, is in part as follows:

"Before creating any special improvement district for the purpose of making any of the improvements, acquiring any private property for any purpose authorized by this act, the Board of County Commissioners shall pass a resolution of intention to so do, which resolution shall designate the number of such district, describe the boundaries thereof, and state therein the general character of the improvements which are to be made, **designate the name of the engineer who is to have charge of the work, and an approximate estimate of the cost thereof. . . .**" (Emphasis mine.)

Section 4576, Revised Codes of Montana, 1935, is in part as follows:

"Whenever a contemplated work, or improvement, in the opinion of the Board of County Commissioners, is of more than local or ordinary public benefit, or whenever according to the estimates furnished by the **County Surveyor or an Engineer approved by the Board of County Commissioners. . . .**" (Emphasis mine.)

Section 4589, Revised Codes of Montana, 1935, is as follows:

**"The cost and expense connected with and incidental to the formation of any special improvement district, including the cost of preparation of plans, specifications, maps, plats, engineering, superintendence and inspection, and preparation of assessment rolls, shall be considered a part of the cost and expenses of making the improvements within such special improvement districts,** and it shall be the duty of the engineer selected as hereinbefore provided to keep an account of all costs and expenses incurred in his office in connection with every special improvement district, and certify the same to the County Clerk, whose duty it shall be to prepare all necessary schedules and resolutions levying the taxes and assessments in such special improvement district." (Emphasis mine.)

Section 4599, Revised Codes of Montana, 1935, is in part as follows:

3. "The term 'incidental expenses' as used in this act, shall include the compensation of the engineer selected as hereinbefore provided for work done by him." . . .

8. "The term 'engineer,' designated in the petition as used in this act, shall be understood and so construed as to mean the person, firm or corporation whose name is designated and approved by the Board of County Commissioners as the engineer in the original petition asking for the improvement and may be the County surveyor."

It is evident from the language of Section 4589, supra, that the expense of preparation of plans, specifications, maps, plats, engineering superintendence, etc. are not to be born by the County but are to be considered the responsibility of the Improvement District and that services rendered in these respects are compensable. If the Legislature had

contemplated that these duties be done by the County Surveyor as a part of his regular work, Section 4589 would not have made those items an expense chargeable to the Improvement Districts.

Part 3 of Section 4599, *supra*, specifically provides that the incidental expenses as set forth in Section 4589 shall include the compensation of the engineer in charge of the District.

Section 4576, *supra*, and Part 8 of Section 4599, both provide that the engineer in charge of the Improvement District may be the County Surveyor or may be another engineer. It is only reasonable to hold that if the position can be held by a private engineer, it would not be considered as one of the regular duties to be performed by the County Surveyor.

It is my conclusion drawn from the above statutes and construction thereof, that the Legislature did not intend that the performance of engineering duties connected with the establishment and maintenance of Rural Improvement Districts should be incumbent upon the County Surveyor as a part of his regular duties. If the Legislature had intended that these duties devolve upon the County Surveyor it would not have been difficult to make such intention apparent by a clear and direct provision in the act providing for Rural Improvement Districts. Since a provision to that effect is missing from the act, I can only find that such was not the intent of the legislature.

In the light of the above conclusions I shall now proceed to answer your six questions specifically one by one.

The County Surveyor may collect fees for services rendered in surveying, engineering and supervising Special Improvement Districts. As decided above such services are not a part of his official duties and the law is clear that he may receive money for services other than official duties. As stated in 43-Am. Jur., *Public Officers*, Section 364, official duties. As stated in 43 Am. Jur., *Public Officers*, Section 364, pages 151-152, the rule is as follows:

"The law does not, of course, forbid extra compensation for extra services which have no affinity or connection with the duties of the office."

In Opinion Number 85, Volume 22, Report and Official Opinions of Attorney General, the then Attorney General held that "A city or County deputy officer may accept employment from a State Agency with the consent of the City Council or Board of County Commissioners where such employment is of a nature not to interfere with such deputy's regular employment by the city or County" and in discussing the effect of Section 4864, Revised Codes of Montana, 1935, which provides that no County officer shall receive for his own use any fees, penalties or emoluments of any kind, except the salary provided by law, the Attorney General used the following language:

"This section is again a limitation on the salary that can be received by an employee from the County employing him, and designating these certain monies collected by him to be County monies and not a part of his personal salary. **This cannot be construed as being a limitation on the employee's receiving compensation for employment outside of and in addition to his official employment for the County, as the limitation is specifically limited to compensation for official duties performed.**" (Emphasis mine.)

In view of the foregoing, the obvious answer to your second question is that the County Surveyor may collect fees for his own use for the surveying of private roads and other duties not of an official County nature and not chargeable to the County. Such employment certainly cannot be deemed a part of the surveyors official duties.

Question three is already answered by the answer to question one. The fees earned are collectable by the County Surveyor and his assistants in addition to their salaries paid from County funds for their official duties.

Your fourth question dealing with the problem of how the repair and maintenance of Rural Improvement Districts should be handled can best be answered by quoting a portion of Section 4592, Revised Codes of Montana, 1935, as follows:

"Whenever any sanitary or storm sewers, lights or light systems, waterworks plants, water systems, or sidewalks, or any other special improvements petitioned for, or created by the State or Federal Government, have been made, built, constructed, erected or accomplished as in this act provided, it is hereby made the duty of the Board of County Commissioners, under whose jurisdiction the district was created or supervised or directed, **adequately and suitably to maintain and preserve said improvements and fully to keep the same in proper repair and operations by contract or otherwise, in such way or manner as the Board shall deem suitable and proper. . . .**" (Emphasis mine.)

The emphasized portion of the above quoted section makes it evident that the Board of County Commissioners has complete discretion as to the methods or procedures to be followed in providing for the maintenance of Rural Improvement Districts. Therefore it follows that the Board may in the exercise of its discretion allow the County Surveyor to do the work, or the Board may call for bids from private contractors, or the Board, if it sees fit, may use any other method of accomplishing the maintenance.

In answering question five, I am obliged to assume that the privately owned land you mention is not included in an Improvement District. If such land is not included in a Rural Improvement District the Board of County Commissioners has no authority to authorize the use of county employees and equipment in roadbuilding, etc., on such

privately owned land. The jurisdiction of the County Board in such cases extends only to public domain and public highways and cannot be extended to work on private property. The rule in Montana is well established that a Board of County Commissioners is a board of limited powers and must in every instance justify its actions by reference to the provision of the law defining or granting its powers. This rule is last quoted in *State ex rel. Bowler v. Board of Commissioners of Daniels County*, 106 Mont. 251, 76 Pac. (2nd) 648. I find nothing in the statutes that would allow the Board of County Commissioners to engage in a business enterprise to the extent of using County employees and equipment in purely private work even though the County be reimbursed for such work.

The answer to question six is made clear in the discussion of Sec. 4592 supra, quoted in part in the answer to question four. The Board of County Commissioners may in its discretion adopt any reasonable means of providing for the maintenance of Rural Improvement Districts. As stated in the answer to question four, the Board may use County employees, it may call for bids from private contractors or may use any other feasible means of maintaining the Improvement Districts.

In summation, it is therefore my opinion that:

(1) A County Surveyor or Deputy may collect fees for his own use in connection with the surveying, engineering, and supervision of Rural Improvement Districts created by the County Commissioners.

(2) A County Surveyor or Deputy may collect fees for his own use in connection with the surveying of private roads and other duties not of an official County nature and not chargeable to the County.

(3) When services are performed in connection with a Rural Improvement District by the County Surveyor or his deputies, the fees earned should not be charged to the Rural Improvement District and credited to the General Fund but rather such fees are to be paid to the County Surveyor or his deputies in addition to their salaries paid from County funds.

(4) The Board of County Commissioners may in the exercise of its discretion provide for the maintenance and repair of the Improvement Districts in any manner the Board shall deem suitable and proper.

(5) The Board of County Commissioners may not authorize the use of County employees and equipment for use in building roads and maintenance of roads and streets, or for improvements on privately owned land if such land is not included in a Rural Improvement District.

(6) It is legal for the Board of County Commissioners to use County Employees and County equipment in making the improvements upon Rural Improvement Districts and such work need not be done by contract after the letting of bids if the Board does not wish to follow such procedure.

Very truly yours,  
ARNOLD H. OLSEN,  
Attorney General.