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## LAWS AFFECTING PUBLIC POWER DISTRICTS

Ralph O. Canaday\*

### I. INTRODUCTION

Senate File 310 of the 1933 Legislature, the Enabling Act providing for the creation of public power and irrigation districts, has now been the law of this state for thirty years.

At the time of its passage, the state was not only in the midst of the great depression, but the devastating drouth of the early 30's with its dust storms and its crop failures was also upon the people. Only those who lived through those terrible years, and saw and felt the desperation and fear that seized the farm population and those dependent upon the farmers for their survival, can even imagine the suffering and hardship that this country experienced. It was against this background that the 1933 Legislature met, and it was out of these conditions that this Enabling Act was born.

Senate File 310 was thought of as being primarily an aid to irrigation development. The chapter of the Act, as it appears in the 1933 Session Laws, is "Irrigation", and the title begins by stating that it is "An Act relating to irrigation, flood control, storage of waters of natural streams . . . ." Then follows the reference to electrical power facilities.

The importance of the emphasis on irrigation at the time the Enabling Act was passed has been justified. The Central Nebraska Public Power and Irrigation District (which irrigates about 120,000 acres of land from its own system and supplies supplemental storage water from its reservoirs for approximately that much additional land) and other irrigation projects were made possible by this Act. It is estimated that Kingsley Dam and other hydraulic facilities construed by the Central Nebraska Public Power and Irrigation District alone have increased the farm income in this state by \$15,000,000 annually. If this estimate is substantially correct, the income taxes resulting from this increased income over the past twenty years have repaid the federal government all the money advanced for this project's construction.

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The most remarkable change in the industrial and domestic life of Nebraska during the past thirty years has been the increased use of electricity. Thirty years ago the entire state used about 500 million kilowatt hours of energy annually. This is to be contrasted with 1962 when Nebraska used approximately four billion kilowatt hours of electrical energy, or about eight times the amount used when the Enabling Act was passed.

In 1933, the amount of rural electrification was negligible. In 1962, rural public power districts and cooperative corporations supplied about 700 million kilowatt hours of electrical energy to the farm homes in this state, or more than the whole state used thirty years ago.

In 1933 there were no large generating plants outside of Omaha. Industry using large quantities of energy was practically confined to the Omaha area. But during this period public power districts have constructed a number of large power plants in Nebraska and have built a high voltage transmission grid system that carries power produced by these plants to the greater part of the state. This grid system of transmission is capable of delivering electric power and energy to the cities and towns throughout the eastern two-thirds of Nebraska, thus providing industry located therein with power at low rates, high voltages, and in sufficient quantities. Not all of this progress can be credited to development brought about by the passage of the Enabling Act, but a very substantial part of it has resulted from this statute.

## II. NATURE OF PUBLIC POWER AND IRRIGATION DISTRICTS

The Enabling Act<sup>1</sup> defines a public power district, or a public power and irrigation district, as "a public corporation and political subdivision of the state." The characteristics of such an organization are well established by the decisions of our courts. It must be created pursuant to an act of the legislature as an agency of the state to promote the public welfare. Its property is public property held by it in trust for the benefit of the people of the state. Its officers are officers and agents of the state. Both its property and its officers are at all times under the plenary control of the state legislature.

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<sup>1</sup> NEB. REV. STAT. § 70-602 (Reissue 1958).

The Supreme Court of Nebraska, in *United Community Services v. Omaha Nat'l Bank*,<sup>2</sup> said:

In regard thereto we have said that: ". . . a public corporation, authorized by the legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the legislature and therefore a governmental subdivision of the state within the terms of section 2, art. VIII of the Constitution, as amended in 1920."

Later on in the same opinion the court said:<sup>3</sup>

As between the district and the state we have, as early as *Regents of University v. McConnell* . . . said: "Hence it is very clear that the rights and franchises of such public corporation never become vested rights as against the state, and its charter constitutes no contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated."

The court was just as emphatic in *State ex rel. Johnson v. Consumers Public Power Dist.*,<sup>4</sup> where it held the district, as a public corporation created by the legislature, subject to all restrictions then or thereafter imposed, irrespective of provisions in the public power district act and petition for the district's creation.<sup>5</sup>

*United Community Services, supra*, illustrates how strictly the Supreme Court interprets the law defining the powers and duties of the officers of public corporations. They will not be permitted to expend the corporation's money for the public welfare unless it be for the particular public welfare for which the corporation is organized.

The ownership of its property by the state and the plenary control of the legislature over its affairs are not the only characteristics of a public corporation. Another prerequisite (likewise applicable to any body which levies taxes or expends public funds) is that it be organized for a public purpose — a purpose which the State itself can pursue.

The Nebraska Supreme Court defines "public corporations" as follows:<sup>6</sup> "Public corporations are all those *created specifically for public purposes as instruments or agencies to increase the effi-*

<sup>2</sup> 162 Neb. 786, 793, 77 N.W.2d 576, 583 (1956). (Emphasis added.)

<sup>3</sup> *Id.* at 799, 77 N.W.2d at 586. (Emphasis added.)

<sup>4</sup> 143 Neb. 753, 10 N.W.2d 784 (1943).

<sup>5</sup> *Id.* at 769, 10 N.W.2d at 795.

<sup>6</sup> *Bliss v. Pathfinder Irrigation Dist.*, 122 Neb. 203, 240 N.W. 291 (1932); *accord, Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896); *Lincoln*

*ciency of government, supply public wants, and promote the public welfare."*

In 1877, the legislature authorized the creation of corporations to drain wet land for the benefit of private individuals. The statute granted these corporations the right of eminent domain. In passing on the constitutionality of this statute, the supreme court said:<sup>7</sup>

This is an infringement of the right of private property, and is unauthorized and void. Even the board of county commissioners have no authority to authorize the location or construction of drains except where they "will be conducive to the public health, convenience, or welfare."

The *Dartmouth College* case<sup>8</sup> is the most famous decision involving what is and what is not a public corporation. Chief Justice John Marshall's opinion contains a very interesting discussion of this subject. In 1754, Reverend Eleazar Wheelock started a school for Indian youth which he financed with his private funds and funds solicited from others. In 1755, King George III granted a charter to the trustees of the school and named it Dartmouth College. Through the years the college was maintained and expanded by private donations. In 1826, assuming that the college was a public corporation because of its nature and functions, the New Hampshire legislature attempted to assume control over it. Justice Marshall admitted that the functions performed by the college were of a public nature, and that they could properly be performed by an agency of the state, but such did not overshadow the fact that Dartmouth College was built with private funds, was a private corporation, and that its charter granted by the King was a contract binding on the state and protected by the federal constitution.

Our public power and irrigation districts have the one qualification that Dartmouth College lacked in order to make it a state agency and amenable to the legislature. Their property belongs to the public, and they are financed by public funds.

### III. CHARTERS OF PUBLIC CORPORATIONS

Perhaps in the foregoing discussion of the nature of public power districts, more emphasis than was necessary was placed on

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& Dawson County Irrigation Dist. v. McNeal, 60 Neb. 613, 83 N.W. 847 (1900); Board of Directors v. Collins, 46 Neb. 411, 64 N.W. 1086 (1895).

<sup>7</sup> Jenel v. Green Island Drain Co., 12 Neb. 163, 10 N.W. 547 (1881).

<sup>8</sup> Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

authority of the legislature over them. There has, however, been a tendency among some lawyers, the legislature, and even the courts to apply rules that apply only to private corporations. This is illustrated by the way the term "charter" has come into use in referring to the petition for the creation of a district filed with the Department of Public Works.

The *Dartmouth College* case has been referred to as follows:<sup>9</sup>

In the celebrated Dartmouth College case, decided by the United States supreme court in 1819, the rule was established that a charter granted by a state to a private corporation constitutes a contract between the state and the incorporators within the protection of the contract clause of the federal Constitution, and the rule thus established has, notwithstanding vigorous opposition and criticism, met with universal recognition and enforcement by the federal and state courts in cases arising under the contract clause of the federal Constitution and similar clauses in state constitutions, whether the corporation was state or under a charter granted by special act of the legislature of a state.

Compare this statement with that of the Nebraska Supreme Court in *Board of Directors v. Collins*,<sup>10</sup> and it becomes apparent that irrigation districts, public power and irrigation districts, and public corporations generally have no charters in the sense in which the term is used relative to private corporations. Referring to irrigation districts the court, in *Collins*, said that they are "without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power . . . ."<sup>11</sup> Note also *United Community Services v. Omaha National Bank*<sup>12</sup> where the court said that a public power district's "charter constitutes no contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated."<sup>13</sup> Also in the *Johnson* case, it was held that a public power district is subject to all restrictions constitutionally imposed upon it, irrespective of provisions in the public power district act; and in a petition thereunder for the district's creation that district will be subject to such act and amendments thereto.<sup>14</sup>

If a person were investigating the powers of a private corporation, he would look to its charter for his answer. Laws enacted

<sup>9</sup> 16 C.J.S. *Constitutional Law* 1351 (1956).

<sup>10</sup> 46 Neb. 411, 64 N.W. 1086 (1895).

<sup>11</sup> *Id.* at 419, 64 N.W. at 1088.

<sup>12</sup> 162 Neb. 786, 77 N.W.2d 576 (1956).

<sup>13</sup> *Id.* at 799, 77 N.W.2d at 586.

<sup>14</sup> *State ex rel. Johnson v. Consumers Public Power Dist.*, 143 Neb. 753, 10 N.W.2d 784 (headnote) (1943).

subsequent to its incorporation would be ineffective to change a private corporation's powers or affect its legal existence. If he were investigating the powers of a public power district, he would look to the statutes which always take precedence over any provisions contained in the petition for its organization.

The term "charter" in legal literature has a number of meanings and is applied to a number of situations. There is no use of the term more meaningless than its application to petitions for the organization of public power districts.

The best illustration of this is the statute under which the present Consumers Public Power District was organized. This district originally included only the city of Columbus within its boundaries, and its directors were all elected from that city. After it received its "charter"; that is, after the petition for its organization was approved, it began to purchase the properties of private power companies all over Nebraska. Within a few years it owned all of such private companies' properties except those of the Nebraska Power Company in Omaha.

In 1943, the legislature decided that a public power district serving such a large area should be managed by a board of directors elected from the entire area which it served. To accomplish this it enacted Chapter 145 of the Laws of Nebraska, 1943. This act provided:<sup>15</sup>

Whenever the State Engineer shall determine, after investigation and hearing, of which ten days' notice shall be given to the district by registered mail, that any district operates or is interested by ownership, lease or otherwise in the operation of electric power plants, distribution systems or transmission lines in more than fifty counties in the state, he shall be authorized to enter an order directing that further operation of the district shall be conditioned upon *the amendment by the district of the petition* for its creation to provide for a board of directors consisting of seven members, to be reduced or increased to that number and to be elected in the manner provided by section 70-704, C.S. Supp., 1941, as amended by this act. Failure to file such amendment, within thirty days after receipt of a notice to do so sent by the State Engineer, shall constitute a forfeiture by the district of all right to transact further business in this state and it shall be the duty of the Attorney General to forthwith institute suit, in the district court of the county where the principal place of business of the district is located, to liquidate its assets and wind up its affairs through a receiver appointed by the court.

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<sup>15</sup> Neb. Laws c. 145, p. 510 (1943), now NEB. REV. STAT. § 70-609.01 (Reissue 1958).

This reorganization act required the directors of the district to amend the original petition by approving the change in the number of members of the board as demanded by the legislature. The area within the district, as set forth in the original petition, was changed by the legislature from the city of Columbus to an area of eighty counties which, in turn, was divided into seven election divisions, with one director to be elected from each division. The names of the counties comprising the new district, and the counties in the election districts were all enumerated in the act itself without any amendment of the petition. The act also provided a different method for determining the eligibility of electors who could vote for directors. These matters, although they were changed in the provisions of the original "charter," were altered by the legislature without requiring the old board to take any action with reference thereto.

What was the logic that induced the legislature, after fixing the number of directors that the reorganized district should have, to compel the old board of directors to ratify the legislature's action, but required no such action by the board relative to the other changes? The coercion used by the legislature to compel the board of directors to ratify the changes in its membership was rather drastic.

If the legislature had sufficient control over the original Consumers District to make the changes just described without the board of directors' approval, or if it had the power to carry out its threat to abolish the district if the directors did not do as directed, then it certainly had the power to change the number of directors without any assistance from the old board.

The legislature cannot do indirectly that which it cannot do directly. The reverse of this is also true. If the legislature had no power to change the number of directors to seven without action by the old board, it could not validly coerce the board to take this action. This is not saying that the action of the legislature was ineffective to accomplish its purpose. It was just useless. So in following the legislative mandate, the directors were not using their discretion as officers and agents of the state, but were merely performing a clerical task that was required of them. Their action was that of the legislature. It was not their own.

There may be other legal questions involving this act, such as its constitutionality. A discussion of them is not within the scope of this paper. The purpose of this discussion of the Consumers Public Power District act is to illustrate the great length that the legislature has gone in the exercise of its plenary control over these



districts and to show how unnecessary, inconsistent and confusing one gets when going around Robin Hood's barn in following the "charter" route to make desired changes in the districts when the legislature, under the absolute control that the supreme court says it has over these districts, could do the job simply and directly.

This district law, amended as it has been by almost every legislature since its enactment, is becoming too complicated, with (1) its different classifications of districts, providing certain functions that some districts can perform and others cannot, and (2) its varying methods for choosing directors. These and other differences make the law confusing—so confusing that a board of directors needs an expert lawyer every time business is transacted.

Let us help at least a little, in the simplification of the law, by eliminating this useless procedure of amending a charter that really does not exist. If these districts have a charter, it is the law under which they were organized and which they are required to obey regardless of any provisions in the petitions of their creation. These petitions have only one function; that is to help make a legal entity out of the proposed district. When that is done, the petition's job is done.

#### IV. TAXATION

One of the perennial controversies that the public power districts face, not only in this state but all over the nation, is the matter of exemption from taxation. The controversy has had an interesting history in this state. It has been before the supreme court, and was the subject of a constitutional amendment adopted in 1958. Still it continues.

The controversy first became acute during the 1939 legislative session. The large districts—The Central Nebraska Public Power and Irrigation District, the Platte Valley Public Power and Irrigation District, and the Loup River Public Power District—having constructed hydroelectric plants and systems, had spent almost all of 1938 negotiating with power companies and investment bankers for the purchases of most of the electric properties of the private power companies operating in the state. The negotiations were nearly completed when the legislature met in January, 1939. A storm of protest against this purchase broke forth. The municipalities seemed suddenly to realize that the property of these districts might turn out to be tax exempt. As a consequence, if the private companies' properties were acquired by the districts, the municipalities would lose considerable tax revenue. Because of this controversy the investment bankers who were to finance the pur-

chases suddenly lost interest. Without financing, the deals fell through.

The districts then began negotiations with the officials and attorney of the League of Nebraska Municipalities to find a solution that would eliminate the objections that the municipalities had to the acquisition of these properties. The result of these negotiations was a compromise. It was agreed that if private power company properties were acquired by the districts, the districts would continue to pay in lieu of taxes the same amounts each year as the power company paid in taxes prior to the year the districts acquired them. This compromise was agreeable to the legislature and was enacted into law.<sup>16</sup>

The next event, chronologically, was the decision of the supreme court holding that the Platte Valley Public Power and Irrigation District was a governmental subdivision of the state and its property was exempt from taxation.<sup>17</sup> The specific question involved was whether or not the personal property of the district was exempt from taxation under article VIII, section 2 of the constitution which provided that "The property of the State and its governmental subdivisions shall be exempt from taxation."

The court was unanimous in holding that this particular district was a "governmental subdivision" and that its property was exempt. The members of the court were not, however, unanimous in the reasons they gave for their support of this decision or the extent to which they thought it should be applied. The question which divided them was the meaning of the term "governmental subdivision." There seemed to be unanimity on the proposition that the constitutional provision would apply to the property of public corporations and political subdivisions which performed "governmental functions," but would not apply to the property of public corporations which performed only proprietary functions.

The judges agreed that because of the constitutional provisions<sup>18</sup> dedicating the water in the natural streams of the state to the people,

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<sup>16</sup> Neb. Laws c. 88, p. 381 (1939).

<sup>17</sup> *Platte Valley Public Power & Irrigation Dist. v. County of Lincoln*, 144 Neb. 584, 14 N.W.2d 202 (1944).

<sup>18</sup> Neb. Const. art. XV, §§ 4, 5, 6, 7.

declaring that the necessity of water in such streams for domestic use and irrigation was a natural want, and declaring that the use of such water for power purposes was a public use that could not be alienated, the development of the use of such water was a governmental function.

Two judges wrote concurring opinions. They based their concurrence on the proposition that the property of the districts was exempt solely on the ground that the district was performing a governmental function in developing a part of the state's water resources in accordance with the provisions of the constitution. These judges both indicated that they hoped the majority opinion would be so interpreted. In fact, the majority may have meant just that. The opinion concludes:<sup>19</sup>

When the state, through its legislature, provides by statutory enactment the manner in which districts, such as the appellant, may be organized and operated for the purpose of using the waters of our natural streams for irrigation and the development of power for public use and such district is formed and part of the state's waters dedicated to its use for such public purposes, then the district is in fact a governmental subdivision under our Constitution.

This then left two tax questions unsettled. First, was the law providing for payment in lieu of taxes constitutional? Second, was the property of districts which did not engage in developing the state's water resources exempt from taxation?

To settle these questions some of the public power districts promoted an amendment to the constitution and were successful in having it adopted in 1958. This amendment reads as follows:<sup>20</sup>

The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section shall be in lieu of all other taxes, payments in lieu of taxes, franchise payments, occupation and excise taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally.

This amendment not only answered the two questions propounded above, but it also levied a small tax on certain revenues of some districts which had not previously been required. It did even more than that. Prior to the adoption of this amendment, the

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<sup>19</sup> *Platte Valley Public Power & Irrigation Dist. v. County of Lincoln*, 144 Neb. 584, 592, 14 N.W.2d 202, 206 (1944).

<sup>20</sup> Neb. Const. art. VIII, § 11.

only tax exemption the districts enjoyed under the constitution was the exemption from property taxes. The legislature's power to levy income taxes, excise taxes, sales taxes, or any other kinds of taxes it saw fit to levy was not restricted. Now these districts are exempt from such taxes.

Our Supreme Court had said:<sup>21</sup> "We do not think that any form of exemption either in the assessment and levy of taxes or from the sale of property for their payment can be sustained unless constitutional or statutory provisions clearly so provide."

In an earlier case, where a county claimed exemption from gasoline tax on the ground that it was a governmental subdivision, the court said:<sup>22</sup>

In this state we are more specifically committed to the view that "the taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself."

And the proper construction of these constitutional limitations necessarily requires the due application of the principle that limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language.

The conclusion is that the language employed in the provisions of our state Constitution, on which the defendant relies, should be given a fair, reasonable interpretation to ascertain the true intent as to their scope, and then should be strictly applied and enforced so that the limits they define shall not be unduly enlarged or extended. The inhibition of section 2, art. 8 of the Constitution as quoted, is limited to "the property of the state and its governmental subdivisions." This court is committed to the view that our "state gasoline tax" here involved is an excise tax and not a property tax.

It is hoped that now taxation of the public power districts is at least one problem which is without the realm of controversy.

## V. CONCLUSION

This discussion does not purport to be exhaustive or erudite. Some of the matters discussed are still controversial. If any of the discussion is thought provoking, it will have accomplished its purpose.

<sup>21</sup> *Ryder v. Livingston*, 145 Neb. 862, 18 N.W.2d 507 (1945).

<sup>22</sup> *State v. Cheyenne County*, 127 Neb. 619, 256 N.W. 67 (1934).