

**County Commissioners—Per Diem and Mileage of—  
Special Meetings—Authority to Superintend Work on State  
Highway and Draw Per Diem Therefor.**

Special meetings of the Board of County Commissioners can be called only upon giving five days' notice, and any special session of the commissioners without a call notice as required by law would not entitle the Commissioners to any per diem for attending the same.

The Board of County Commissioners have no authority to superintend work on public highways and draw per diem therefor.

The Board of County Commissioners are entitled to receive per diem and expenses for inspecting highways for the purpose of ascertaining whether the work has been properly completed.

The Board of County Commissioners are not authorized to inspect the same highway every few days when such inspection is not necessary for the purpose of ascertaining whether the work has been properly completed.

Max F. Kuhr, Esq.,  
County Attorney,  
Havre, Montana.

My dear Mr. Kuhr:

You have requested my opinion upon the following questions submitted to you by your County Auditor:

"(1) How much per diem and under what circumstances are the Board of County Commissioners allowed to draw each month?

"(2) Can the Board of County Commissioners collect time for special meetings where there is no call, and where no minutes have been taken?

"(3) Can the Commissioners put in time superintending the work of the State highway?

"(4) Are the Commissioners entitled to per diem and mileage for viewing the same highway every few days?"

The County Commissioners are entitled to no per diem or mileage or fees except such as are specifically given them by law. The statutes allowing compensation to County Commissioners for attendance at meetings and in connection with road work are Section 2893 of the Revised Codes of 1907, Chapter 148 of the Laws of 1915, and Chapter 172 (Sub-Chapter III) of the Laws of 1917, as amended by Chapter 19 of the Extra Session Laws of 1919. The Supreme Court has ruled in *State ex rel. Payne v. District Court*, 53 Mont. 350, and *State v. Story*,

53 Mont. 573, that the Commissioners must look to specific authority in the statute for their right to collect either per diem or expenses. In the Payne Case the court said:

"These fees are legal or illegal depending upon whether they are, or are not, authorized by law. A county commissioner can lawfully collect for services performed in virtue of his office only such fees or other compensation as the law specifically authorizes. The law authorizes per diem and mileage for attending the meeting of the board (Sec. 2893, Rev. Codes), and per diem and expenses while inspecting contract construction work on a highway or bridge, under a proper order of the board. (Laws 1915, p. 319.) \* \* \*

"The accused, acting in his official capacity as county commissioner of Madison county, spent one day seeing about a right of way for which he charged and collected from the county \$8 and \$5 additional for expenses, etc. This item particularly is not comprehended within any provisions of the law authorizing fees or other compensation to a member of the board of county commissioners for services rendered in his office, and is therefore prima facie illegal."

The questions raised in your inquiries 3 and 4 have been largely answered by an opinion of this office rendered to J. E. Kelly, Esq., County Attorney of Jefferson County, on April 21, 1921, in which it was held that neither the Board of County Commissioners as a body nor its members individually are authorized by law to superintend work on public highways and draw per diem therefor. The provisions of the law relating to this subject are found in Chapter 15 of the Extraordinary Session Laws of 1919, amending Sub-Chapter III of Chapter 172 of the Laws of 1917, and reads as follows:

"Section 12. The Board of County Commissioners may direct the County Surveyor or some member or members of said Board to inspect the condition of any proposed highway, or highways, or work on any highway or bridge in the county during the progress of the work, and before payment therefor, and such member or members of said Board shall receive for making said inspection, the sum of Eight Dollars (\$8.00) per day, and actual expenses, and the County Surveyor shall receive for making such inspection when directed and for all other work performed for the county under the direction of the Board of County Commissioners, the sum of Eight Dollars (\$8.00) per day and actual expenses, which shall be audited and allowed in the same manner as any other claims against the county."

The above section merely authorizes the County Commissioners to receive per diem and expenses "for making said inspection," and the language of the section indicates that such inspection is for the purpose of ascertaining whether the work or some portion thereof has

been properly completed so as to authorize payment therefor, and not for the purpose of actively supervising or superintending such work during its performance. In this view of it such frequency of inspection as would amount to superintendence of the work, or inspection of the same highway "every few days," when such inspection is not necessary for the purpose of ascertaining whether the work has been properly completed so as to authorize the County Commissioners to pay out county funds therefor, is outside of the provisions of the law authorizing per diem to the County Commissioners and such per diem should not be allowed.

Your second question is answered by Chapter 148 of the Laws of 1915, reading as follows:

"The Board of County Commissioners, except as may otherwise be required of them, may meet at the county seat of their respective counties on the first Monday of each and every month of the year, for the purpose of allowing bills and attending to any other business that may regularly come before them, and may sit not exceeding three (3) days at each session, except the December session, at which time they may sit not exceeding eight (8) days. But the Board may at any time, by giving at least five (5) days public notice, hold an extra session of not over three (3) days' duration; provided, that the limitations as to the time of sessions of the Board of County Commissioners contained in this section shall not apply to counties of the First, Second, Third or Fourth Classes."

It is to be observed from the above chapter that extra sessions of the Board of County Commissioners can be held only after "giving at least five days' public notice." An extra session without a call noticed as required by this chapter, and no record of which appears in the minute books, would not entitle the County Commissioners to any per diem for attending the same, and in no case may an extra session be of more than three days' duration in a county of the fifth class, which you state is the class to which Hill County belongs.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.