

**State Highway Commission—Rights-of-way—State Land
—Highways.**

In view of the provisions of chapter 60, laws of 1927, the state highway commission must secure an easement for a state highway over state lands and must pay for the same in the manner provided by chapter 60, laws 1927.

February 20, 1928.

State Highway Commission,
Helena, Montana.

Gentlemen:

You have requested my opinion on the following questions:

“1. Is it necessary for the state of Montana, acting through the state highway commission, to secure an easement for rights-of-way from the state of Montana through the department of state lands and investments for the construction of state highways over lands now held in the name of the state of Montana and commonly known as ‘public lands’ or ‘state lands’ where such rights-of-way are outside state land section lines?”

“2. Must compensation be paid by the state highway commission to the department of state lands and investments for such rights-of-way?”

In a former opinion of this office appearing in volume 11, Opinions of Attorney General, page 189, it was held:

“The provisions of the constitution and enabling act requiring certain land granted to the state to be disposed of at public sale and for a minimum price of \$10 per acre do not prevent the state land board from granting a free right-of-way over state lands for the extension of the Great Northern Railway.”

This would be equally applicable to state highways were it not for the fact that the legislature by section 61, chapter 60, laws of 1927, provided:

“The right of way for public highways on state lands must always follow the section lines when physically practicable. The state board of land commissioners shall be the judge of whether or not it is necessary to deviate from the section lines, and the board is hereby authorized and empowered to grant easements for right of ways for highways and streets outside the state land section lines through proceedings as follows:

“Application must be made by the board of county commissioners, or by the council or governing board or body of the city or town having jurisdiction, which application shall describe the proposed right of way according to the survey, show the necessity for the proposed highway or street and give such

additional information as the board may require. This application shall be accompanied by two exact copies of the official plat of the proposed highway or street duly verified by the affidavit of the county surveyor or county or city engineer, or other engineer having prepared the same, endorsed thereon. These plats shall show the quantity of land taken by the proposed highway or street from each forty-acre tract or government lot of state land over or through which it passes and also the amount of land remaining in each portion of such forty-acre tract or government lot. When deemed necessary by the board, the aforesaid plats shall show all these facts for such smaller subdivisions as the circumstances may render desirable for the state.

“Upon the filing of such application and plats, the commissioner of state lands and investments shall whenever he deems it necessary cause the proposed right of way to be viewed and examined by the chief field agent or some assistant field agent who shall report his findings to the board. The board shall thereupon consider the application and report and take such action as it deems proper, including the fixing of compensation and damages to be paid to the state. The compensation so fixed shall be the full market value of the estate or interest disposed of through the granting of such right of way easement, and the damages shall be the actual damages resulting to the remaining land as nearly as the same can be ascertained. If the right of way is granted according to the plat, then such plat shall become the official plat thereof, and one copy shall be retained in the office of the commissioner and the other copy shall be returned to the county, city or town from which it was received. The board shall cause right of way deeds to be issued for all such easements that it may hereafter grant upon full payment therefor being made.

“If the state land over or through which such right of way outside of section lines is applied for, is under certificate of purchase or under sales contract, the purchaser, or his assignee must be made a party to the proceedings, and his consent in writing to the laying out and establishment of the proposed highway and to the amount of compensation and damages to be paid must be filed with the board before such right of way shall be granted. The board shall be the judge of how much of such compensation and damages shall be paid to the state and applied on the certificate of purchase or sales contract and of how much thereof, if any, shall be paid to the purchaser, as the circumstances in each individual case may warrant. The provisions of this paragraph shall apply to all grants of right of ways on state lands outside of section lines. The interest and equity of such purchaser or his assignee shall be subject to proceedings in eminent domain.”

While I feel that this section would apply to the state as well as counties and cities, it is unnecessary to decide that question for the reason that section 62 of said act further provides:

“The state board of land commissioners may grant an easement for right of way across or upon any portion of state lands for any ditch, reservoir, railroad, private road, telegraph or telephone line, or for any other public use, as defined in the code of civil procedure; provided, that this section shall not be construed to grant authority to convey any such land, except for the purposes above set forth; and provided further, that whenever lands granted for any of the purposes mentioned in this section shall cease to be used for such purposes, said easement shall forthwith terminate upon notice to that effect to the person to whom such grant was made, served at his last known post office address. The board shall charge and cause to be collected the full market value of the estate or interest disposed of through the granting of any such easement and also fix, charge and cause to be collected the amount of the actual damages resulting to the remaining land or lands from the granting of such easement as nearly as the same can be ascertained.”

In view of the foregoing provisions it is at once apparent that both of your questions must be answered in the affirmative.

The manner in which the transfer of this land is made is not material but in order that the proper record of the transfer can be made and kept it will probably be advisable that the same be conveyed by right of way deed. The fact that the state will appear in said deed as both grantor and grantee will not, in my opinion, affect the transaction, for the reason that in both instances the state is simply acting for the public in two separate capacities.

Very truly yours,

L. A. FOOT,
Attorney General.