

**State Highway Commission—Powers—Rights-of-Way—
Damages.**

Damages caused to adjoining property by the construction of a highway which is a damage to the property itself and not a mere infringement of the owner's personal pleasure or enjoyment is a damage incidental to the construction of the highway and the state highway commission has authority to pay for the same under the provisions of section 1797 R. C. M. 1921.

October 13, 1928.

State Highway Commission,
Helena, Montana.

Gentlemen:

You have requested my opinion on the following question:

“Where a state highway is constructed so that a high grade is raised in front of property abutting on the highway causing the houses on this property to be left in a pocket so that flood waters back up on the property and otherwise cause damage to the extent of depreciating the property in value, has the state highway commission authority to settle with the owners thereof for such damages? In other words, has the state highway

commission authority to pay for damages caused to property by the construction of a state highway where the property is not actually taken for public use?"

Section 14 of article III of our state constitution provides as follows:

"Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner."

And in the case of *Less v. City of Butte*, 28 Mont. 27, Chief Justice Callaway, then acting as commissioner of the supreme court, said:

"It seems very clear to us that this section was drafted in the broad language stated for the express purpose of preventing an unjust or arbitrary exercise of the power of eminent domain. It overturns the doctrine that one owning city or town property must continually live in dread of the changing whims of successive boards of aldermen. Constitutions which provide that 'private property shall not be taken for public use without just compensation' are but declaratory of the common law, and contemplate the taking of property only. Under constitutions which provide that property shall not be 'taken or damaged' it is universally held that 'it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation'."

And further said:

"While it is doubtless true that the constitution does not authorize a remedy for every diminution in the value of property which is caused by public improvement, the damages for which compensation is to be made being a damage to the property itself, and not including mere infringement of the owner's personal pleasure or enjoyment."

See also *Eby v. City of Lewistown*, 55 Mont. 113, 173 Pac. 1163.

It is therefore my opinion that if the damage caused to adjoining property is as mentioned in your inquiry a damage to the property itself and not a mere infringement of the owner's personal pleasure or enjoyment, that said damage is incidental to the construction of said highway, and the state highway commission has authority to pay for the same under the provisions of section 1797 R. C. M. 1921.

Very truly yours,

L. A. FOOT,
Attorney General.