

## Opinion No. 1.

**Counties—County Commissioners—  
Easement—Right-of-Way—  
Power Line—Consider-  
ation.**

HELD: Board of county commissioners has power to sell a right-of-way for a power line over county lands. The sale thereof should be in accordance with law and the compensation therefor should be just, that is to say, adequate under the circumstances.

December 1, 1934.

Mr. Fred C. Gabriel  
County Attorney  
Malta, Montana

Your letter to us of November 14th, is as follows:

"Some little time ago I wrote you concerning the authority of the Board of County Commissioners of Phillips County, to grant a right-of-way for a power line over lands belonging to the county.

"The question was raised in this county possibly by the State Examiner. At any rate, the commissioners requested me to give them an opinion on the matter, and I in substance, stated that I believed that the commissioners did have the right to grant the right-of-way for a power line or transmission line, and based my opinion upon subsection 10 of section 4465 as amended by Chapter 100 of the Session Laws of 1931; and also I call your attention to the language used in the case of *Arnold vs. Custer County*, cited in 83 Montana at page 130.

"In that case you will find the matter fully discussed at page 141.

"Should the commissioners grant a right-of-way, I assume there should be a nominal consideration, or is it your opinion that the consideration should be actual and that the matter should be arrived at by proper appraisalment, etc.?"

Subdivision 10 of Section 4465, Revised Codes, 1921, as amended by Section 1 of Chapter 100, Laws of 1931, among other things provides that "the board of county commissioners \* \* \* shall have the power to sell any property, real or personal, however ac-

quired, belonging to the county, and which is not necessary to the conduct of the county's business or the preservation of its property."

The right of way is an easement and an easement is real property. (Sections 6667, 6749, Revised Codes 1921; *R. M. Cobban Realty Co. v. Donlan*, 51 Mont. 58; *Mannix v. Powell County*, 60 Mont. 510.) The easement sought being real property, the board of county commissioners is vested with authority to sell it, and the sale thereof should be made in accordance with the provisions of subdivision 10. (*Franzke v. Fergus County*, 76 Mont. 150; 15 C. J. 538; 2 Nichols on Eminent Domain, sec. 511.) As the board is without power to make gifts, the compensation therefor should be just, that is to say, adequate under the circumstances. (Sec. 14, Art. III of the Constitution; sec. 9944, R. C. M. 1921; 15 C. J. 538; *State v. Suncrest Lumber Co.*, 154 S. E. 72; *Kansas City Southern Ry. Co. v. Commissioner of Int. Rev.* 52 Fed. (2d) 372; *Faulkner v. City of Nashville*, 285 S. W. 39; *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, 83 S. E. 1031; 20 C. J. 641.)

We are fortified in the view that the board may sell an easement of the kind in question by the fact that under the law of eminent domain "lands belonging to the state, or to any county, city or town, not appropriated to some public use," may be taken for the construction of an electric power line for public use. (Chapter 14, Sections 9933-9936, Revised Codes 1921; 20 C. J. 620; 2 Lewis on Eminent Domain, sec. 414.)