

Opinion No. 73.

**Counties—County Roads—Roads—
Highways, Counties—County Commis-
sioners—Public Highways and Roads.**

**Held: A county road which has been
“laid out” is a public highway
and must be worked and main-
tained by the county.**

September 27, 1945.

Mr. Lyman H. Bennett, Jr.
County Attorney
Madison County
Virginia City, Montana

Dear Mr. Bennett:

You have requested my opinion concerning the following:

Is it the duty of county commissioners to maintain a road which has been laid out many years ago, even though not platted nor ever approved by the commissioners if such road is presently used by the public?

We have in this county a large number of roads leading into various gulches which have been used by the public as wood roads and to get to and from various mining properties, etc. The commissioners of this county do not deem them such roads as to require maintenance by the county.

In answering your question, it is necessary to consider the definition of a public highway.

Section 1612, Revised Codes of Montana, 1935, provides:

“All highways, roads, lanes, streets, alleys, courts, places, and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways.” (Emphasis mine.)

In the first paragraph quoted from your letter, you ask concerning roads which were “laid out” many years ago.

In *French v. County of Lewis and Clark*, 87 Mont. 448, 228 Pac. 455, our Supreme Court said:

“‘All highways . . . laid out by the public . . . are public highways’ (Sec. 1612, Rev. Codes, 1921). As the conjunction ‘or’ is used, the highways described became a county road, or public highway, on being laid out whether ‘erected’ or not.

“The term ‘to lay out,’ when used with reference to highways, ‘has been from the earliest times, the appropriate expression for locating and establishing a new highway.’ . . . and means the taking of all necessary legal steps for the establishment of, and looking toward, the construction of a highway, but does not include the actual physical act of construction . . . When once ‘laid out’ according to law, a highway does not become extinct through not being opened or used by the public.”

The roads in question having been “laid out” are public highways and continue to be so until abandoned in accordance with Section 1614, Revised Codes of Montana, 1935, and Chapter 143 of the Political Code as amended. There is no indication in your letter that legal steps had been taken to abandon the road.

Section 1622, Revised Codes of Montana, 1935, makes it the duty of the board of county commissioners to cause public highways to be worked and maintained. (*French v. County of Lewis and Clark*, supra.)

It is therefore my opinion that a county road which has been “laid out” is a public highway and must be worked and maintained by the county.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General