Opinion No. 38

Highways—Federal Aid Highway System—Appropriation of Private Right of Way—Damages Resulting From Appropriation of Private Right of Way—Relocation of Utility Property Upon Appropriation of Private Right of Way—Just Compensation—Statutory Construction

Held: 1. The ownership of an easement by a public utility, although in a sense devoted to a public use, is private property, and, as such, cannot be taken or entered upon and applied to a different public use except upon payment of just compensation.

2. The effect of Section 14, Article III of the Montana Constitution is a constitutional limitation which denies the legislature the power to authorize the taking or damaging of property of a citizen without just compensation having first been made to or on behalf of the owner thereof.

3. The cost of removal and relocation of the facilities of a public utility from property appropriated by the state is a damage resulting from the taking thereof for which compensation must be made.

4. "Just compensation," as prescribed by Sec. 14, Art. III, Mont. Const., requires that the owner of the property taken must be made whole for that which is taken from him to the end that he shall be restored to as good a position pecuniarily as he would have been if his property had not been taken.

5. The provisions of Chapter 254, Laws of 1957 (Section 32-1625, RCM, 1947) do not apply to a case in which the utility is located upon a right of way which, subsequent to the location of the utility thereon, is appropriated by the state for the purpose of including this right of way in the Federal-Aid or Interstate Highway System.

December 16, 1957

Mr. Paul T. Keller, Attorney
Montana Highway Commission
Helena, Montana

Dear Mr. Keller:

You have requested my opinion concerning the application of Chapter 254, Laws of 1957 (Section 32-1625, RCM, 1947) to a case in which the utility is located upon a right of way which, subsequent to the location of the utility thereon, is appropriated by the state for the purpose of including this right of way in the Federal-Aid or Interstate Highway System. The question has arisen as to whether, upon the appropriation of such a right of way, the cost of relocation of the facilities of the utility located thereon are to be paid in the manner prescribed by Chapter 254, supra.

The right of way held by the utility in such a case is an easement, which, as an appurtenance to land, constitutes an interest in real property. Sections 67-207 and 67-601, RCM, 1947; Mannix v. Powell County 60 Mont. 510, 199 Pac. 914; Cobban Realty v. Donlan et al., 51 Mont. 58, 66, 149 Pac. 484. Although, in a certain sense this easement is devoted to a public use it is private property, and, as such, it cannot be taken or entered upon and applied to a different

public use, or to the use of a different corporation except upon payment of just compensation. 18 Am. Jur. "Eminent Domain", Section 173, page 806; Missoula v. Mix, 123 Mont. 365, 370, 214 Pac. (2d) 212.

The constitutional prohibition against the taking or damaging of private property for a public use without just compensation having first been paid is Section 14, Article III of the Montana Constitution, which provides:

> "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."

The effect of this prohibition upon legislation which has as its subject the appropriation of private property for a public use was enunciated by the Montana Supreme Court in the case of Eby v. City of Lewistown, 55 Mont. 113, 173 Pac. 1163, wherein the court at page 122 of 55 Mont. said:

> ". . . Expressed in terms clearly prohibitory, without words in itself or elsewhere in the Constitution expressly declaring it to be otherwise, it is a limitation denying to the legislature the power to authorize the taking or damaging of the property of the citizen without a fulfillment of the condition expressly imposed by it, viz: 'Without just compensation having been first made to or paid into court for the owner.' (Art. III, sec. 14.)"

Not only does this constitutional provision require that compensation be made for the taking of the easement, but it also commands that compensation be made for the damages resulting from this taking. In defining the scope of recoverable damages in such a case, the Montana Supreme Court in the case of State et al., v. Bradshaw Land and Livestock Company, 99 Mont. 95, 110, 43 Pac. (2d) 674, stated:

> ". . . Recoverable damages in this type of cases, as in all cases of this kind, must be the natural and proximate consequence of the action taken. They must be actual, direct and certain, actionable and reasonable. They must be readily ascertainable and not remote, speculative or contingent. (Lewis and Clark County v. Nett, 81 Mont. 261, 263 Pac. 418; State v. Hoblitt, supra.)"

Unquestionably the cost of removal and relocation of the facilities of the utility, from the land so taken, is such a recoverable damage. See Butte, Anaconda and Pacific Ry. Co., v. Montana Union Ry. Co., 16 Mont. 504; City of San Gabriel v. Pacific Ry. Co., 18 Pac. (2d) 996; 18 Am. Jur. "Eminent Domain", Sec. 174 page 807.

When the constitutional requirement of "just compensation" exists as a measure of damages, in such cases, it is well settled that the owner of the property taken must be made whole for that which is taken from him to the end that he shall be restored to as good a position pecuniarily as he would have been if his property had not been taken. U. S. v. Wheeler C.C.A., Minn., 66 Fed. (2d) 977, 984; City of Fort Worth v. U.S.C.A. Tex., 212 Fed. (2d) 474, 476; U.S. v. Finn,

D.C. Cal. 127 Fed. Supp. 158, 167; General Motors Corp. v. U.S., C.C.A. Ill., 140 Fed. (2d) 873, 875, 878; 18 Am. Jur. "Eminent Domain", Section 240, page 874.

Should the cost of removal and relocation of the facilities in the instant case be paid in the manner set out by Chapter 254, Laws of 1957, the owner of the property taken will only receive "seventy-five per cent (75%) of all costs of relocation . . .", which is considerably less than a "full and perfect equivalent for the property taken," City of Fort Worth v. U. S. supra; and, in my opinion would deny the owner of the property his "just compensation". Sec. 14, Art. III, supra.

Guided by the rule that a statute must always be given a construction consistent with its validity, if at all possible, (Stae ex rel. Rich v. Garfield Couny, 120 Mont. 568, 188 Pac. (2d) 1004; Phillipsburg v. Porter, 121 Mont. 188, 190 Pac. (2d) 676;) it is my opinion that the provisions of Chapter 254, supra, do not apply to a case, such as the instant case, in which the utility is located upon a right of way which, subsequent to the location of the utility thereon, is appropriated by the state for the purpose of including this right of way in the Federal-Aid or Interstate Highway System. Any other view would render the legislation open to serious constitutional objection, for, as was said in Eby v. City of Lewistown, supra:

> "These constitutional provisions are imperative, and any law which violates them is incapable of enforcement."

See, also, Barnard v. City of Butte, 48 Mont. 102, 136 Pac. 1064; Peasley v. Trosper, 103 Mont. 401, 405, 63 Pac. (2d) 131.

Very truly yours,
FORREST H. ANDERSON
Attorney General