

State Lands, Right of Way Over. Right of Way, Over State Lands. Reservations, for Right of Way. Reclamations, State Lands, to Obtain for.

1. Reservation to government, made by law, and attaches whether named in conveyance or not.
2. Compensation cannot be claimed for acreage embraced in right of way.
3. Improvements placed on land prior to location of right of way must be compensated for.
4. Where improvements made after location of right of way no compensation can be claimed.
5. Land taken by government not for right of way purchased at \$10.00 per acre, if title is still in state.
6. Where title to the land taken, not for right of way, has passed from the state, the government must deal with owner of the land.
7. Contract for sale of land prior to February 28, 1905, not subject to right of way named in said chapters 53 and 147.

Helena, Montana, September 13, 1909.

Hon. State Board of Land Commissioners,
Helena, Montana.

Gentlemen:

I am in receipt of your communication of September 9, requesting from this office a construction of chapter 53, laws of 1905, and chapter 147, laws of 1909, relative to the rights-of-way required by the reclamation service of the United States over lands now opened by the state, and also over lands which have been conveyed by the state to private individuals subsequent to February 28, 1905, the date when said chapter 53, laws of 1905, was approved.

This matter was discussed at some length in an opinion rendered by this office to the Honorable F. H. Ray, Register of the State Land Office on May 11, 1909, which opinion you have on file in your office.

Keeping in mind that that opinion dealt only with lands owned or conveyed by the state since February 28, 1905, the opinion heretofore rendered to Mr. Ray may be epitomized as follows:

1. Both section 2, chapter 53, laws of 1905, and section 31, chapter 147, laws 1909, make grants of right-of-way for the purposes therein named to the United States over all lands owned by the state at any time subsequent to February 28, 1905, a reservation for such purposes is required to be contained in any conveyance issued by the state to any such lands. But the grant is made by the law, not by the contract of conveyance. Hence, the grant of right-of-way attaches, whether reserved in the conveyance or not. For any action or lack of action by the state land department can have the effect of repealing, amending or modifying the positive provisions of a mandatory statute.

2. Where the land taken by the government is for right-of-way for "ditches, canals, tunnels, telephone and telegraph lines" no compensation can be legally demanded for the acreage embraced in the right-of-way.

3. Where improvements are placed on the land prior to the definite location of the right-of-way, compensation may be legally demanded for damages sustained to such improvements, which must be determined in proceedings between the government and the owner of the land or improvements.

4. Where the right-of-way was definitely located prior to any improvements being made, no compensation can be legally demanded for any damages sustained to such subsequent improvements.

5. Where the land, the title to which is still in the state, is taken by the government for purposes other than right-of-way, the minimum fee of ten dollars per acre should be charged.

6. Where the title to land, required for purposes other than right-of-way, has passed from the state, the government must deal with the owner of the land, and the ten dollar limit does not apply, as the state has no longer any jurisdiction over the land.

7. Where certificates of sale of state lands were executed and delivered prior to the passage and approval of said chapter 53, laws 1905, and no reservation was contained therein with respect to right-of-way,

then the reservation contained in said chapter 53, 1905, and chapter 147, 1909, do not apply, for the obligations of the contract could not be impaired by subsequent legislation.

Very truly yours,

ALBERT J. GALEN,

Attorney General.