

**County Commissioners, Fees of. Fees, of County Commissioners. Roads, Viewers, County Commissioners not to Act As.**

Boards of County Commissioners are not authorized by law to dispense with the Board of Viewers provided for by Cap. 72, Laws of 1913; nor are they authorized to perform this work themselves; hence, they are not entitled to fees therefor.

October 20th, 1914.

Hon. J. A. Slattery,  
County Attorney,  
Glendive, Montana.

Dear Sir:

I am in receipt of your communication under date October 13th, regarding the fees to be paid to Boards of County Commissioners when acting as a Board of Viewers of proposed new highway. I note that you have held that the Board may act as such Board of Viewers, and that they may receive for such services the sum of \$8 per day.

A first reading of Section 3 of Chapter 4 of Chapter 72, Session Laws of the 13th Legislative Assembly, might indicate that the County Commissioners could act as such Board of Viewers. A careful consideration of the act in question must, I think, lead to a different conclusion. It is to be noted that the provisions of this section provide:

"The Board of County Commissioners \* \* \* may appoint and cause to be notified three disinterested freeholders of the county, one of whom shall be the county surveyor, who shall act as viewers, or may visit such roads themselves."

The following sections, especially Section 5, specifically state what the duty of the Board of Viewers shall be, and what their report shall contain. There is also to be noted an entire absence of any language other than the phrase "or may visit such roads themselves" indicating that the Board of County Commissioners shall act in lieu of the Board of Viewers appointed in the usual way, as well as a total lack of direction as to how the Board of County Commissioners, if they did act as such Board of Viewers, should make their report, or whether or not they should make any at all. It seems strange that if the legislature intended that the Board of County Commissioners should act as such a Board of Viewers, that they did not make a clear expression of that intent, either by saying that the commissioners could act instead of a Board of Viewers, or by giving direction as to what records the county commissioners, when acting in such capacity, should make. I note that you state that the commissioners of your county have in practice abolished the office of county surveyor. Here it is well to make a comparison of the former law upon this subject found in Section 1392, Revised Codes of Montana, 1907, which was in part as follows:

"The Board of County Commissioners may appoint three viewers, one of whom may in the discretion of the Board of County Commissioners be the county surveyor."

The section of the law under consideration makes it mandatory upon the commissioners to appoint the county surveyor as one of the viewers, the legislature apparently intending that the county surveyor should be one of the members of this board. It is further to be noticed that the language used in regard to the county commissioners is different from that used in reference to the board of viewers. All that is said of the county commissioners, is that they may visit such roads themselves. They are not even required to view or lay out the

road, as are the viewers, provided for by the act. Another consideration which leads me to think that the legislature did not intend to dispense with the Board of Viewers is that a construction, such as you have placed upon the acts, would virtually make the Commissioners the judges of their own act, in as much as upon any hearing had for the benefit of non-consenting land owners, the commissioners would be compelled to pass judgment upon the justness of their previous decision. This is hardly consonant with good public policy. Section 13 of Chapter 3 of this Act, has reference to an entirely different sort of inspection, that of inspection of work already performed under orders of the Board, and therefore, can hardly be taken as a criterion or authority of the inspection of proposed highways.

You state, also, in your letter:

“If there was an urgent necessity for the creation of the highway in question, the Board would undoubtedly remain in session until after the report of the Viewers was filed.”

I am not impressed with this argument. Section 6 provides for action upon the report, and though it does say “or at the time when the report is filed, if then in session, must fix the day for hearing the same, etc.,” I think there is no authority in this language justifying the Board of County Commissioners to remain in continuous session until the Viewers can make their survey and report, and I doubt if very many cases would arise of such an urgent nature as to require such action on the part of the Board.

For the reasons above stated, I am of the opinion that the Board of County Commissioners is not granted authority to act as a Board of Viewers for the survey of proposed new highways, and that, therefore, they could not act as such. They would, therefore, not be entitled to compensation as such Viewers, in any amount.

Yours very truly,

D. M. KELLY,  
Attorney General.