

Pipe Lines—County Commissioners—Highways—Right of Way.

County Commissioners cannot grant a right of way over the public highway for the purpose of laying and maintaining a pipe line to an individual or corporation not a common carrier.

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My dear Mr. Bottomly:

You have submitted for my opinion the question whether the Board of County Commissioners of a county may grant to an individual or corporation, not a common carrier, a right of way or easement for the laying of a pipe line upon a public highway.

A Board of County Commissioners is one of limited powers and can exercise only those powers expressly delegated to it by the law or those that are of necessity implied from the powers expressly delegated. It must, therefore, justify its every act by reference to the provisions of law defining and limiting its powers.

State ex rel. Lambert v. Coad, 23 Mont. 131.

State ex rel. Gillette v. Cronin, 41 Mont. 293.

If the Board of County Commissioners can grant the easement or right-of-way indicated by you, it must, therefore, find its authority for so doing in the statutes expressly defining its powers or such powers as are necessarily implied therefrom.

Subdivision 4 of Section 4465, R. C. M. 1921, defining the general powers of Boards of County Commissioners, gives to such Boards power to "lay out, maintain, and manage public highways, * * * within the county."

Section 1622, R. C. M. 1921, relating to the powers and duties of County Commissioners respecting highways, gives the various Boards of County Commissioners in the several counties general supervision over the highways in their respective counties, enumerating in detail various powers of the said Boards. All the powers granted by this section have reference to the acquisition, building, maintenance, and abandonment of public highways.

Section 1616, R. C. M. 1921, provides:

"By taking or accepting land for a highway, the public acquires only the right of way and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this Act and the Civil Code."

Considering all of the above statutes, it is clear that the only purpose for which a county acquires a highway is for the convenient use of the public in traveling over and upon its course, and that the only powers that are granted to the Boards of County Commissioners are for the purpose of providing such highways, maintaining them in serviceable condition for the public, and abandoning them when the use has ceased. It is equally clear that there could be no power necessarily implied from the above granted powers which would authorize the granting of the easement or right-of-way.

As was said by the Court in the case of *State ex rel. Spring Water Co. v. Town of Monroe, et al.*, 82 Pac. 888, in discussing a statute similar to Section 4465 (supra):

"The Board has power to lay out, discontinue, or alter county roads or highways within their respective counties, and to do all other necessary acts relating thereto according to law. * * * The privilege of laying water pipes under or along a public highway would seem to be wholly foreign to any express or implied power conferred by the above statute. Furthermore, the power to grant a franchise such as is here claimed must be derived from the Legislature."

In addition to the above, a reference to Chapter 258, R. C. M. 1921, entitled: "Regulation of Common Carriers of Oil," indicates clearly that private pipe lines cannot acquire a right-of-way over or along the public highways of the state.

Section 3848 of Chapter 258, above, defines common carriers of oil, and further provides that:

“the provisions of this Act shall not apply to those pipe lines which are limited in their use to the wells, stations, plants and refineries of the owner and which are not a part of the pipe line transportation system of any common carrier as herein defined.”

Section 3850, R. C. M. 1921, specifically grants a right-of-way along, across, or under any public highway of the state to such persons, firms, etc., operating pipe lines which come within any of the definitions of common carriers as set forth in Section 3848, above; provides for the method of acquiring such right-of-way from the County Commissioners of the various counties, and provides further for the regulation of such persons, firms, etc., by the Board of Railroad Commissioners.

A careful consideration of Chapter 258, above, indicates that the Legislature recognized the fact that individuals or firms operating pipe lines have no inherent right to build or maintain such lines along, over, or under the public highways of the state. Having granted such right to these individuals or firms which are common carriers under the provisions of the Act and excluded from the operation of the Act such individuals and firms as are purely private in their nature, it follows that individuals and firms operating private pipe lines have no right to an easement or right-of-way over, along, or under the highways, and could not compel the County Commissioners to grant such right-of-way to them.

Since individuals and firms operating private pipe lines are expressly excluded from the operation of the Act and can not avail themselves of it to compel the County Commissioners to grant a right-of-way over the public highways, it is clear that the County Commissioners can find no implied power to grant the right-of-way voluntarily from the terms of the Act.

It is, therefore, my opinion that the Board of County Commissioners of a county may not grant to an individual or corporation, not a common carrier, a right-of-way or easement for the laying of a pipe line upon a public highway.

Very truly yours,

L. A. FOOT,
Attorney General.