

**County Commissioners — Public Highways — Fences —
Gates—Cattle Guards.**

County commissioners have no authority to permit land owners adjoining the public highways to construct fences across the right-of-way leaving auto gates with cattle guards for the passage of motor vehicles and gates to permit the passage of livestock.

Mr. Denzil R. Young,
County Attorney,
Baker, Montana.

November 10, 1931.

My dear Mr. Young:

You have requested my opinion whether the county commissioners have the authority to permit land owners adjoining the public highway to construct a fence across the right-of-way leaving auto gates with cattle guards for the passage of motor vehicles and gates in the fence adjacent to such auto gate to permit the passage of livestock by opening such gates.

I do not believe that the county commissioners have the authority to grant the permission to do the things above mentioned. The policy of the law is that public highways shall be kept open and free from obstruction. Section 1727 R.C.M. 1921 and subsequent sections forbid encroaching upon highways by the erection of fences, buildings, etc., and unless there is some specific provision in the law which grants authority to the board of county commissioners to permit encroachments upon the highways no such authority exists as that would be contrary to the general policy of the law forbidding encroachments. I do not find in the law any authority which authorizes the board of county commissioners to permit persons to place cattle guards, fences or gates upon a public highway.

Subdivision 5 of chapter 59 of the laws of 1929 referred to by you cannot be construed to grant such authority to the board of county commissioners. It merely grants to the board the right to acquire a right-of-way over private property for the use of public highways, which right-of-way is paid for from the general road fund of the county and where roads or trails are or will be dedicated to public use as highways the county commissioners may construct and maintain thereon substantially constructed cattle guards, appurtenances and gates adjacent thereto.

It will be seen that the right to construct cattle guards, appurtenances and gates adjacent thereto is conferred upon the board of county commissioners in those cases where a road or trail has been or will be

dedicated to use as public highways as distinguished from the acquisition by the county of a right-of-way for the construction of a highway. Even this section does not authorize the county commissioners themselves to erect cattle guards, appurtenances and gates upon a public highway which has been laid out by the county under the statute as that right is confined to dedicated roads or trails, that is, roads or trails that have been laid out or erected by persons rather than the county commissioners and which have been or will be dedicated by said persons to the public. (See section 1612 R.C.M. 1921.)

From the foregoing, it is my opinion that the board of county commissioners does not have the authority to grant to any person the authority to erect a fence across the right-of-way of a public highway even though there is left an auto gate with cattle guards for the passage of motor vehicles and gates in the fence to permit the passage of livestock by opening of such gates.

Very truly yours,

L. A. FOOT,
Attorney General.