

No. 312

COUNTY CLERK, Fees of—RECORDATION OF INSTRUMENTS—CERTIFICATE OF RECORDATION, when fee not required for

Held: A person having an instrument recorded in the office of the County Clerk, as ex-officio recorder, paying for the recording per folio and for which recording fee is not otherwise provided, need not secure a certificate, with seal affixed, that such instrument is recorded; and, if a seal is not affixed to the endorsements required by Section 4805 and Section 4806 of the Revised Codes of Montana of 1935, regardless of whether or not the endorsements are construed to constitute a "certificate," no charge may be made for the endorsements which show such instrument has been recorded; but, if such endorsements relating to the recordation of the instrument are authenticated by the seal of the County Clerk, a charge of fifty cents (50¢) shall be made.

December 11, 1941.

Honorable W. A. Brown
State Examiner
State Capitol
Helena, Montana
Attention: Mr. A. M. Johnson, Deputy State Examiner

My dear Mr. Brown:

You have requested the opinion of this office as to the meaning and effect of the fourth paragraph of Section 4917 of the Revised Codes of Montana of 1935, as amended by Chapter 87 of the Laws of 1941. This statute relates to the fees which must be charged by the County Clerks, as ex-officio recorders, in connection with the recordation of instruments and the part to which your question relates is as follows:

"For certificate that such instrument has been recorded with seal affixed, fifty cents (50¢)."

Possibly this provision would be more easily and more sensibly readable if a comma followed the word "recorded."

The term "such instruments" refers back to the preceding paragraphs of the section, as amended, which relate to the fee to be charged per folio "for recording and indexing each instrument of writing allowed by law to be recorded, except as hereinafter provided."

The duties of the County Clerk, as ex-officio recorder, with respect to instruments deposited in his office to be recorded are set out in Section 4805 and Section 4806 of the Revised Codes of Montana of 1935. When he has performed his duties in respect to recordation, he is required to endorse on the instrument "the time when and the book and pages in which it is recorded, and must deliver it, upon request, to the party leaving the same for record, or to his order." (Section 4806, Revised Codes of Montana, 1935.) No fee is required for the performance of this official duty. No statute is found which requires a certificate an instrument has been recorded must be secured from the County Clerk, as ex-officio recorder, or that a person recording any instrument pay for such a certificate. A certificate, when seal is affixed, may be of advantage to the party having the instrument recorded in order that the instrument, with the sealed certificate affixed, be prima facie proof the same has been recorded; and some persons may require or desire such a certificate. In such cases, a fee of fifty cents (50¢) is required in addition to the "per folio" charge set out in the statute. It will be noted that, in later parts of Section 4917, as amended, some fee charges specified include the furnishing of a certificate, with seal, that the instrument has been recorded.

Whether or not the endorsements required on an instrument deposited with the County Clerk for recordation constitute a certificate "without a seal" is not necessary to determine. In a sense it is a certificate, since it is "a writing by which an officer or other person bears testimony that a fact has or has not taken place." (11 C. J. 76.) However, if such endorsement is authenticated by the seal of the County Clerk, the certificate, with seal, that the instrument has been recorded—which the statute contemplated—has been furnished and the fee should be collected therefor. It is not necessary for the clerk to affix the seal unless the party recording requests a seal to be attached.

It is my opinion a person having an instrument recorded in the office of the County Clerk, as ex-officio recorder, paying for the recording per folio and for which recording fee is not otherwise provided, need not secure a certificate with seal affixed, that such instrument has been recorded; and, if a seal is not affixed to the endorsements required by Sections 4805 and 4806 of the Revised Codes of Montana of 1935, regardless of whether or not the endorsements are construed to constitute a "certificate," no charge may be made for the endorsements which show such instrument has been recorded—but if such endorsements, relating to the recordation of the instrument, are authenticated by the seal of the County Clerk, a charge of fifty cents (50¢) shall be made.

Sincerely yours,

JOHN W. BONNER
Attorney General