

Opinion No. 137

**Highways—State Highway Commission—County Commissioners,
Power of State Highway Commission to Abandon a State
Highway or Portion Thereof, Without Joint Order of
the Board of County Commissioners.**

Held: That the Montana State Highway Commission can abandon a State highway, or a portion thereof, as distinguished from a County highway, without a joint order of the Board of County Commissioners of the County affected.

December 1st, 1950.

Mr. Harry H. Jones, Attorney
State Highway Commission
Helena, Montana

Dear Mr. Jones:

You have requested my opinion on whether or not the Montana State Highway Commission has the power to abandon a State Highway or portion thereof, without joint order of the Board of County Commissioners of the County affected.

At first blush, it would appear that the law requires participation by the Board of County Commissioners before a State highway can be abandoned because of Section 32-105, Revised Codes of Montana, 1947, which reads:

"32-105. (1614) Abandonment or vacation of highways. All public highways once established must continue to be public highways until abandoned by operation of law, or by judgment of a court of competent jurisdiction, or by the order of the Board of County Commissioners of the County in which they are situated; but no order to abandon any highway shall be valid unless preceded by due notice and hearing as provided in this act; **and no State highway can be abandoned except on the joint order of the Board of County Commissioners and the State Highway Commission.**" (Emphasis supplied.)

Also from the following language used in *State et al., vs. Holblitt et al.*, 87 Mont. 403, 288 Pac. 181, decided in 1930, it would appear that the Board of County Commissioners has a voice in the abandonment of a State highway:

"The highway commission is empowered, "in conjunction with the Board of County Commissioners of the several counties of the State," to designate what public roads shall be State highways; the establishment and construction of such highways, under Federal aid projects, is under the control of the State Highway Commission, and it is authorized to make changes in State highways but nowhere in the Act granting powers to the commission is the commission empowered to discontinue or abandon a County road superseded by a State highway. The power to lay out and establish, construct or maintain highways does not confer power to vacate them. The power to discontinue a public highway is vested in the Board of County Commissioners of the County on petition of freeholders of the road district." (Code sections and cases cited are omitted.)

However, in spite of what I have set forth above, upon reading *State ex rel. State Highway Commission, et al., vs. District Court, et al.*, 105 Mont. 44, 69 Pac. (2d) 112, decided in 1937, it appears that the County Commissioners have no say in the abandonment of a State highway.

Briefly, the facts of this action are these: The State Highway Commission of the State of Montana called for the submission of bids to construct a Federal Aid Project Highway between Augusta and Lincoln, Montana. The letting of the bid was opposed on the ground, among others, that the Montana State Highway Commission was without authority to expend money for the construction of the road because it was not designated a State highway in conjunction with the Board of County Commissioners of Lewis and Clark County as provided in what is now Section 32-1606, Revised Codes of Montana, 1947, which reads:

"32-1606. Commission to Prescribe Certain Rules—Designation of State Highways. The State Highway Commission shall have power and it shall be its duty to formulate all rules and regulations necessary for the government of the State Highway Commission and it is hereby authorized to make all rules necessary to comply with the provisions of the Federal Aid Road Act of Congress, approved July 11, 1916, and all other acts granting aid for public highways, and to obtain for the State of Montana the full benefit of such acts. **The State Highway Commission is hereby authorized to, and shall' in conjunction with the Board of County Commissioners of the several counties in the State, designate such public roads in the State as shall be classed as State highways** and subject to improvements under the provisions of said Federal Aid Road Act of Congress, and the State Highway Commission in conjunction with the Board of County Commissioners shall also

formulate necessary rules and regulations for the construction, repair, maintenance and marking of State highways and bridges, and may provide for local supervision in such cases." (Emphasis supplied.)

In this case the Supreme Court of the State of Montana after tracing the history of our highway laws said:

"Running through the original act of 1913, and all subsequent acts and amendments to the highway laws, we see a clear Legislative intent to create a State Highway Department as an arm of the State Government, vested with broad powers in order that such department might bring to realization the State's vision of a system of highways such as we enjoy today. The only part the counties have had, or were intended to have, in this work of progress was by giving cooperative aid to the commission, and their participation was merely incidental. Counties are vested with no affirmative or constructive power by any of the old Acts nor by the present law. We are clearly of opinion that the Legislature did not intend to create the highway commission as a State agency to carry out the State's highway construction plans, and at the same time vest in any County, another State agency, the power to control and, in effect, veto constructive acts of the commission done in compliance with the mandate of the Legislature. And we think that to the extent that this court has heretofore construed our State highway statutes its decisions confirm our conclusions here."

The Court then set out the substance of the holdings of several Montana cases including *State, et al., v. Hoblitt, et al.*, which I have referred to before. In commenting on *State v. Hoblitt* the court said:

"In passing we think it well to state that that part of the foregoing opinion wherein it is stated that the power to lay out and construct highways does not confer the power to abandon, and that part relative to the power to discontinue public highways, obviously refer to County highways and not to State highways, as the power to 'lay out, alter,' etc., granted by Section 1797 (now 32-1615, R.C.M., 1947) **carries the implied power to abandon or change a State highway;** and we further think that where the highway commission is empowered to do all things necessary to obtain the Federal aid to build roads, the commission would have the power to comply with such changes in any established route as might be advised by Federal authorities." (Emphasis supplied.)

The court reviewed the power of the State Highway Commission relative to constructing, improving and maintaining highways in the State of Montana, and to enter into all contracts and agreements with the United States in connection with the construction or maintenance of highways in the State of Montana under the provision of the Federal Aid Road Act. These powers are embodied in Sections 32-1606, 32-1609, and 32-1615, Revised Codes of Montana, 1947.

After discussing these powers the court went on to say:

"The State Highway Commission is the creature of the Legislature and has no powers except those granted to it by the Legislature. The same is true as to powers vested and exercised by the several counties and it would be an unreasonable construction of the statute to assume that the Legislature intended to set up a commission such as the highway commission and vest in it rather extraordinary powers, and then vest in another subdivision of the State government any power that might be exercised to defeat the effective exercise of the powers vested in the commission, and such would be the result if the contentions above advanced in the action at bar were upheld."

and,

"A County is a subdivision of the State—a State agency. It is elementary that the principal, which is the State here acting through the Legislature, has absolute control over the agent—the County—in any such matter as is involved in this controversy, and it would be an anomaly in law if the agent could arbitrarily nullify the act of the principal in any conflict between the two. **We think the express provisions of our highway statutes above recited, and others of like tenor, must necessarily be construed as nullifying any such power in the counties as is contended for here, and if it can be said that any such power was ever vested in the counties by any provisions of the statutes, we hold that such provisions have been repealed by implication.** To hold otherwise would necessarily deny to the commission a vital power essential in giving effect to the expressed purposes of the Legislature in creating the commission and clothing it with authority to do the things it is necessarily directed to do and "to do all other things necessary or required to carry out fully the co-operation contemplated by the said Act of Congress as hereby assented to relative to the construction and maintenance of roads and highways in the State of Montana." (Section 1791) Note:—Now Section 32-1609, R.C.M., 1947. (Emphasis supplied.)

Although the code section, which is now 32-105, Revised Codes of Montana and which is the section first mentioned in this opinion, was never specifically referred to in this case of State, ex rel., v. District Court, et al., it is my opinion that from the case the following observations can be made:

1. The Court decided that because of the powers given to the State Highway Commission to layout, alter, construct, improve and maintain highways in the State of Montana; to enter into contracts and agreements with the United States in order to procure benefits under the law known as the Federal Aid Road Act, and to give the State of Montana good highways, that the Legislature did not intend to allow the counties to have any power to in any way

defeat the exercise of these powers of the State Highway Commission.

2. That any statute or statutes that would give the counties power to defeat the powers of the State Highway Commission are repealed by implication.

In view of the foregoing, it is my opinion that the provisions of Sections 32-1606, 32-1609 and 32-1615, Revised Codes of Montana, 1947, giving the State Highway Commissioners certain powers heretofore mentioned in this opinion, repeal by implication that portion of Section 32-105, Revised Codes of Montana, 1947, calling for a joint order of the Board of County Commissioners and the State Highway Commission when abandoning a State highway. Therefore, it is my opinion that the State Highway Commission can abandon a State highway, or portion thereof, as distinguished from a County highway, without a joint order of the Board of County Commissioners of the County affected.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.