

**Opinion No. 6****Eminent Domain Proceedings—Costs  
—Commissioners**

**Held:** The Compensation of the commissioners in an eminent domain proceedings must be paid by the party seeking to condemn the property.

March 12th, 1951

Mr. Ted James  
County Attorney  
Cascade County  
Great Falls, Montana

Dear Mr. James:

You have requested my opinion concerning the payment of commissioners appointed by the court in eminent domain proceedings. You ask in particular if the commissioners should not be paid out of the budget of the clerk of the court rather than by the parties as part of the costs which are taxed by statute.

Section 93-9911, Revised Codes of Montana, 1947, provides in part:

"If the court or judge is satisfied that the public interests require the taking of such lands, it or he must make an order appointing three competent persons, resident in said county, commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner, or other person interested in such property, as damages, by reason of the appropriation of such property, and specify the time and place of the first meeting of such commissioners, and fixing their compensation. Any party may object to the appointment of any person as a commissioner on the same grounds that he might object to him as a trial juror."

While it is apparent from the above quoted that the commissioners act in a capacity similar to that of jurors and determine the amount of damages and can be challenged on the same grounds that apply to the challenge of trial jurors, yet, such commissioners are to be distinguished from trial jurors. Eminent domain proceedings are wholly statutory, *Housing Authority v. Bjork*, 109 Mont. 552, 98 Pac. (2d) 324, and are special proceedings, *State ex rel. Davis v. District Court*, 29 Mont.

153, 74 Pac. 200. The powers and authority of commissioners are defined in Section 93-9911 and their compensation is fixed by the court at the time of appointment. Referees are similar to commissioners in that they, too, often determine questions of fact.

Section 25-405, Revised Codes of Montana, 1947, authorizes the payment of jurors from the general fund of the county. There is no statutory authority for the payment of commissioners in eminent domain proceedings from either the county general fund or the fund for the operation of the office of the clerk of the court. However, costs are defined in Section 93-8618, Revised Codes of Montana, 1947, which states that a party is entitled to include in his bill of costs "The legal fees of witnesses, including mileage, or referees and other officers . . ."

Section 93-9915, Revised Codes of Montana, states in part:

". . . upon any verdict or assessment by commissioners becoming final, judgment shall be entered declaring that upon payment of such verdict or assessment, together with the interest and costs allowed by law, if any, the right . . . to take, use and appropriate the property . . . shall . . . be and remain in the plaintiff . . ."

It thus appears that the fees of commissioners are "costs" within the meaning of Section 93-8618 which includes the fees of "referees and other officers," and their compensation must be paid by the party instituting the eminent domain proceedings under the above quoted portion of Section 93-9915.

Section 93-9921, Revised Codes of Montana, 1947, which is a portion of the chapter on eminent domain proceedings, provides:

"Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court."

This statute has been applied by our Supreme Court to appeals from the awards of the commissioners, *State et al. v. Bradshaw Land Co.*, 99 Mont. 95, 43 Pac. (2d) 674, and has not been applied to the original proceedings. If the owner of the property which is taken

for public purposes had to pay any costs in the initial proceedings then Section 14 of Article XI of the Montana Constitution would be violated. This constitutional provision reads as follows:

"Private property shall not be taken or damaged for public use without just compensation having been made to or paid into court for the owner."

This office held in Volume 13, Report and Official Opinions of the Attorney General, at page 141, that the defendant in condemnation proceedings is not required to pay a stenographer's fee, appearance fee or fee for entering judgment in the initial proceedings. In 18 Am. Jur. 1020, the text states:

"In proceedings for the appropriation of land to the public use, the owners of the land are entitled to full compensation, without deduction for any part of the costs incurred in the ascertainment of the amount."

This office in the opinion above cited made the following statement which has application here:

"This opinion is not to be considered as indicating that the defendant in condemnation proceedings may not be liable for his and the state's costs incurred subsequent to the award by the commissioners appointed by the court to appraise the property condemned as there are other laws and facts which govern these costs and which need not be considered here."

The fact the defendant is relieved of paying the fee of commissioners does not in any way put the burden of payment on the county or the clerk of the court.

It is therefore my opinion that the compensation of the commissioners in an eminent domain proceedings must be paid by the party seeking to condemn the property.

Very truly yours,  
ARNOLD H. OLSEN  
Attorney General