

VOLUME NO. 37

OPINION NO. 116

COUNTY COMMISSIONERS - Authority to temporarily close a county road due to hazardous conditions; HIGHWAYS - Authority to temporarily close a state highway due to hazardous conditions; REVISED CODES OF MONTANA, 1947 - Sections 16-1004, 32-2134, 32-2135, 32-2203(25), 32-2406, 32-2801, 32-2803 and 32-3002; MONTANA ADMINISTRATIVE CODE - § 23-2.6AVI(2)-S6090(1).

HELD: The authority to temporarily close a state highway or county road, due to hazardous conditions, belongs to the Department of Highways and each Board of County Commissioners, respectively. The designation of a particular individual having this authority is left to the discretion of the Department of Highways and each Board of County Commissioners. The latter may appoint a county road supervisor or superintendent capable of making this decision. Only in cases of extreme emergency may the Highway Patrol block traffic, and then, only temporarily.

24 February 1978

Harold F. Hanser, Esq.
Yellowstone County Attorney
Yellowstone County Courthouse
Billings, Montana 59101

Dear Mr. Hanser:

You have requested my opinion concerning temporary closures of state highways and county roads due to adverse weather conditions or other natural disasters creating a hazardous condition. The specific questions you have asked are:

1. What individual has the authority to make this decision?
2. How is the decision actually executed?
3. Who has the responsibility for making the actual physical closure of the road?

The Legislature has not set forth every incidental power related to the regulation of state highways and county roads. It has, however, placed the general authority to construct, alter, improve, repair and maintain the state highways in the State Department of Highways. Section 32-2406, R.C.M. 1947. The same general powers are held by each Board of County Commissioners with respect to county roads. Sections 16-1004 and 32-2801, R.C.M. 1947. "Maintenance," as used in the Highway Code, is defined as "preservation of the entire highway, including surface, shoulders, roadsides and structures, and such traffic control devices as are necessary for its safe and efficient utilization." Section 32-2203(25), R.C.M. 1947.

Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. 2A Sutherland, Statutory Construction, § 55.04 (4th ed. 1973). The authority to order temporary closures of highways in order to remedy hazardous conditions is incidental and necessary to the general duty to repair and maintain the highways. The Montana Supreme Court has recently recognized that the Highway Department, having the duty of building and maintaining state highways safely, is answerable if it fails to do so. State ex rel. Byroth v. District Court, 34 St. Rptr. 1447 (1977). Since it is potentially liable for failure to maintain the state highways in a safe condition, the department has implied power to protect itself from liability by ordering temporary closures of state highways until hazardous conditions are remedied. This rationale applies to each Board of County Commissioners with respect to county roads.

The procedure and practice requirements of the Montana Highway Patrol coincide with this result. MAC § 23-2.6AVI(2)-S6090(1) provides:

BLOCKING HIGHWAYS, WEATHER CONDITIONS. So that the motoring public will be better informed as to actual winter driving conditions, and to

coordinate our activities with the Montana Highway Department, the following policies will be in effect:

1. Under no circumstances, except in case of extreme emergency are any roads to be arbitrarily blocked to traffic unless authorized by the Highway Commission. If adverse conditions prevail and you feel that it would be in the interest of the public safety to close a section of highway, inform the District Engineer or the local maintenance man and request proper authority.

2. Highways blocked as the result of an accident or stalled motorists would be of a temporary nature, and your authority to block the highway temporarily will be recognized as it will in other cases of emergency or when District or Division Engineers or Maintenance Foremen cannot be reached. If possible, such conditions should be brought to the attention of the Highway Department so that hazardous conditions may be eliminated. The Highway Department has developed a state-wide road report which is being released to the public daily. It is suggested that before releasing information of a general nature, you confirm highway conditions with that department.

Which individual makes the decision and the procedure followed lies within the discretion of the Highway Department and each Board of County Commissioners, respectively. Prior to 1974, the responsibility for maintenance and repair of state highways belonged to the Highway Commission. The Montana Supreme Court held that this responsibility encompassed the formulation of plans for the construction, maintenance, and repair of state highways, but due to physical necessity, the details of the work rested in the hands of subordinates, not the members of the Commission. Coldwater v. State Highway Commission, 118 Mont. 162 P.2d 772 (1945). By an amendment of section 32-2406, R.C.M. 1947, Department of Highways now has the responsibility to formulate general plans of maintenance and repair. However, physical necessity and the exigent nature of the decision involved in temporary closures of highways may require that the initial decision be in the hands of delegated subordinates. The designation of a particular individual to make this decision lies within the discretion of the Highway Department.

In the case of county roads, the Board of County Commissioners may, in their discretion, appoint a county road supervisor or a county road superintendent. Section 32-2803, R.C.M. 1947. The county road supervisor or superintendent, if appointed, serves at the pleasure of and under the control and direction of the board, and supervises all work to be performed on the county roads. Sections 32-2803(2)(a) and 32-3002(1), R.C.M. 1947. The county road supervisor or superintendent, if appointed, would be capable of making this decision.

The responsibility for effective actual physical closure also is placed in the Department of Highways and the Board of County Commissioners. Section 32-2134, R.C.M. 1947, requires the Department of Highways to place and maintain traffic control devices necessary to regulate, warn or guide traffic. This same responsibility is placed in the hands of local authorities for highways under their jurisdiction, i.e., the Board of County Commissioners for county roads. Section 32-2135, R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

The authority to temporarily close a state highway or county road, due to hazardous conditions, belongs to the Department of Highways and each Board of County Commissioners, respectively. The designation of a particular individual having this authority is left to the discretion of the Department of Highways and each Board of County Commissioners. The latter may appoint a county road supervisor or superintendent capable of making this decision. Only in cases of extreme emergency may the Highway Patrol block traffic, and then, only temporarily.

Very truly yours,

MIKE GREELY
Attorney General