

VOLUME NO. 38

OPINION NO. 39

COUNTIES - Responsibility for installation of culverts in municipalities;

COUNTY COMMISSIONERS - Duty to install culverts in municipalities;

HIGHWAYS - City streets crossing irrigation ditches;

IRRIGATION - Ditches, duty to build bridges where streets cross;

MUNICIPAL CORPORATIONS - Construction of bridges or culverts within limits;

WATER AND WATERWAYS - Natural streams within municipalities, duty to build bridges over;

MONTANA CODE ANNOTATED - Sections 1-1-108, 7-14-2101(2)(b), 7-14-2201(4), 7-14-2204(1), 7-14-2502(3).

HELD: When a city street is dedicated and opened to public use after the construction of an irrigation ditch that crosses the street, it is the duty of the county commissioners, pursuant to section 7-14-2204(1), MCA, to build and maintain any bridge or culvert necessary to the opening of the street over the ditch.

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Gentlemen:

You have requested my opinion on the following question:

When a city street is dedicated and opened to public use after the construction of an irrigation ditch that crosses the street, are the county commissioners responsible for building bridges or culverts necessary to the opening of the street over the ditch?

Section 7-14-2204(1), MCA, provides:

Each board of county commissioners shall construct and maintain every bridge over a natural stream necessary to be constructed and maintained in any city or town.

The statute goes on to require the city or town to share in the costs of paving or planking the bridges constructed by the county within the municipal limits.

The first question raised by your inquiry is whether the county's duty to build bridges under section 7-14-2204(1), MCA, includes the duty to install culverts. The general statutory provision concerning bridges does not specifically answer this question. Section 7-14-2101(2)(b), MCA, merely states that the term "bridge" includes "rights-of-way or other interest in land, abutments, superstructures, piers, and approaches except dirt fills." The more explicit statute on the power of a county to levy special taxes for bridge construction, however, amplifies the general definition of bridges to encompass culverts by allowing the collection of taxes for the building and maintenance of "any drainage structure located on, over, or through any road or highway." § 7-14-2502(3), MCA. Although section 7-14-2204(1), MCA, does not contain this specific definition, it is logical to interpret the statutory scheme on the county's duty to build bridges and its authority to collect taxes for that purpose as pertaining to the same types of structures, whether they are constructed inside or outside the limits of a city or town. See § 7-14-2201(4), MCA (as amended by 1979 Mont. Laws, ch. 194). It is therefore my opinion that the duty to build bridges imposed by section 7-14-2204(1) includes the duty to install culverts when such devices are deemed most appropriate for conveying water beneath a public street or highway.

A further question presented by your inquiry is whether an irrigation ditch may be considered a "natural stream" under section 7-14-2204(1), MCA. The answer to this question depends on the circumstances surrounding the original establishment of the street or road and the construction of the intersecting ditch.

According to the common law rule, when a public entity dedicates and opens a thoroughfare that crosses a pre-existing ditch or canal, the public entity is responsible for building any necessary bridges or culverts. City of Indianapolis v. Indianapolis Water Co., 185 Ind. 277, 113 N.E. 369, 375 (1916); see State ex rel. City of Livingston v. State Water Conservation Bd., 134 Mont. 403, 414, 332 P.2d 913, 920 (1958). A corollary to this common law rule is that irrigation ditches and canals that predate public roads with which they intersect are considered natural streams as to those roads, even though, they may have been

artificially constructed in the first instance. City of Indianapolis, 113 N.E. at 375; City of Oswego v. Oswego Canal Co., 6 N.Y. 257, 266 (1852).

Section 1-1-108, MCA, provides that the common law is the controlling law in Montana unless it is superseded by or in conflict with a statute on the same subject. Section 7-14-2204(1), MCA, which allocates the responsibility for building bridges in cities and towns, does not define the scope of the term "natural stream" as used therein. Therefore, the common law on the subject must be used to supply the definition of the term in applying the statute to the factual situation presented here. As stated earlier, an irrigation ditch established prior to the existence of a public street that intersects the ditch is deemed a natural stream as to that street under common law. Consequently, such a ditch must also be considered a natural stream within the meaning of section 7-14-2204(1), MCA.

THEREFORE, IT IS MY OPINION:

When a city street is dedicated and opened to public use after the construction of an irrigation ditch that crosses the street, it is the duty of the county commissioners, pursuant to section 7-14-2204(1), MCA, to build and maintain any bridge or culvert necessary to the opening of the street over the ditch.

Very truly yours,

MIKE GREELY  
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