

VOLUME NO. 38

OPINION NO. 57

HIGHWAYS - Relinquishment of right-of-way easement;  
HIGHWAYS - Abandonment vs. sale;  
EASEMENTS - Right-of-way for highway purposes;  
DEPARTMENT OF HIGHWAYS - Authority to hold funds in trust;  
MONTANA CODE ANNOTATED - Sections 60-4-201 through 60-4-208.

- HELD: 1. The code provisions regarding abandonment are to be followed when the Highway Commission relinquishes a right-of-way easement.
2. The Highway Department has authority to hold funds in trust for a local government.

27 November 1979

Morris L. Brusett  
Legislative Auditor  
State Capitol  
Helena, Montana 59601

Ron Richards, Director  
Department of Highways  
Highways Building  
Helena, Montana 59601

Gentlemen:

You have requested an opinion regarding the negotiations that have occurred with the Highway Department, the Anaconda

Company, and Local Government of Butte-Silver Bow surrounding the closure of a portion of U.S. Highway 91, commonly known as the Woodville Hill. I have rephrased those questions as follows:

1. When a right-of-way easement is relinquished by the Highway Commission, are the code provisions regarding sale or abandonment to be followed?
2. Does the Department have authority to hold funds in trust for a local government?

On December 11, 1972, the Anaconda Company filed a petition with the State Highway Commission for the abandonment of a portion of U.S. Highway No. 91. After some period of time, on August 9, 1977, the director of the Department of Highways recommended to the highway commission that this section be abandoned with Anaconda being required to bear the cost of a future replacement facility and the studies necessary to determine appropriate location. The State Highway Commission agreed to abandon the highway and adopted a formal motion at its meeting of November 1, 1977, subject to a formal agreement with Anaconda and payment of 1.8 million dollars to be used for alternative traffic facilities which would be agreeable to the government of Butte-Silver Bow and the Highway Department. On February 1, 1978, an agreement was signed between the Montana State Highway Commission and the Anaconda Company in which the commission agreed to abandon the Woodville Hill Highway and the Anaconda Company agreed to deliver 1.8 million dollars to the commission.

It is the position of the Department of Highways that the procedure described above was in fact an abandonment of that portion of U.S. Highway 91 and that the 1.8 million dollars received by the Department is to be held in trust for the government of Butte-Silver Bow for the purpose of developing alternative traffic facilities to replace the Woodville Highway. It is the position of the Legislative Auditor that the transaction described above may constitute a sale of the Woodville Highway. The Auditor further asserts that even if the transaction was an abandonment, the Department has no authority to hold the 1.8 million dollars in trust for Butte-Silver Bow and that the money belongs to the State of Montana. It is my opinion that the relinquishment of a right-of-way easement is an abandonment and that the Department does have authority to hold funds in trust for the construction and maintenance of alternative traffic facilities in the future.

Initially, it is important to note that the Highway Department's interest in the Woodville Hill road was an easement, and not a fee simple. This distinction is critical, in light of the decision of the Montana Supreme Court in Park County Rod and Gun Club v. State, 163 Mont. 372, 517 P.2d 352 (1973). In that case the State Highway Department had acquired a small roadside park along a state highway by an instrument the grantors labeled "easement." The Department later abandoned the adjoining highway and the park and gave a quit claim deed for the park area to the heirs of the original grantors. Park County Rod and Gun Club wished to acquire the tract for members' use and filed suit, alleging that the reconveyance to the heirs was a sale and that the sale was illegal because the statutes required appraisal, bidding, and other procedures. The district court ruled in the club's favor and the judgment was appealed. The Supreme Court, reversing the district court, ruled that the interest held by the State and reconveyed to the heirs was an easement. The court went on to state that the interest created by the easement was so limited in nature as to not be a saleable interest:

The only problem then is whether the state, acting through the highway department, can by administrative procedure, give the Whites a quit claim deed to clear their title. There was, according to the record, a long-established administrative procedure for handling easements which was followed by the highway department. The highway department acquires various "interests in real property" which might be termed transitory, or temporary licenses, permits, leases and easements for construction, maintenance and general highway uses. To say that the language used in section 32-3910, R.C.M. 1947 (60-4-202, MCA), "any interest in real property" must be sold at public auction extends to interests of a limited nature for specific highway purposes would make even neighborly permission impossible. Such interests of a limited or restricted nature are not saleable interests. This is particularly so where the "interest" is merely a right to use, as distinguished from an estate of inheritance or title to real estate.

In the instant case, plaintiff would have us hold the instrument created a fee simple title with covenants running with the title. Under this theory, of course the state would have held such an "interest in real property" as to have required bids. But, as we have pointed heretofore, such was not the case.

163 Mont. at 378.

The Court went on to discuss the long standing administrative practice of the Department.

Another reason appears in a long-standing administrative interpretation of the language "any interest in real property" as not governing easements, leases, and construction permits, in that the interest is such a limited one, usually acquired for a specific highway purpose, that it is not a saleable interest and is therefore not subject to section 32-3910, R.C.M. 1947. State v. King Colony Ranch, 137 Mont. 145, 350 P.2d 841; State ex rel Ebel v. Schye, 130 Mont. 537, 305 P.2d 350.

Accordingly, we find the district court was in error in holding an easement of this nature to be such "an interest in real property" as to require public sale.

Logic compels the conclusion that if the interest in question is not a saleable interest, then the only proper method of disposing of a right-of-way easement is through abandonment. Sections 60-4-201 through 60-4-208, MCA, set forth the methods through which the department may divest itself of property. If an interest is not saleable, the only one of these provisions which may apply is that relating to abandonment. Consequently, it is my opinion that the disposition of a right-of-way easement by the Highway Department must be subject to the abandonment provisions of the Montana Codes. This conclusion is buttressed by the very nature of an easement for right-of-way. A right-of-way easement interest held by the Highway Department cannot be conveyed to, or held by, any other person or public agency under the Court's holding in Park County Rod & Gun. Whenever the Department relinquishes the right to maintain a highway or ceases to exercise it actively, the right disappears. Under the provisions of section 60-4-201, MCA, the

Department is vested with the power to "lay out, alter, construct, reconstruct, improve, repair, and maintain highways." No other agency or individual is vested with that authority by Montana law. See, for example, § 7-14-4108, MCA. Thus, when the Department divests itself of a right-of-way easement, the purpose for the easement ceases to exist, as does the easement itself. It follows that the right embodied by an easement in favor of the Highway Department may not be conveyed.

This is not to say, however, that the Department may not enter into an agreement where it agrees to abandon a right-of-way easement in exchange for consideration. In such a case, the consideration furnished by the Department is not an interest in real property, but rather an agreement to do a particular act, viz., follow the statutory procedures for abandoning a right-of-way. This procedure is consistent with the statute cited above, and is apparently a common practice.

To summarize, it is my opinion that the negotiations produced an abandonment of the Department's right-of-way, and not a sale, since the Department's interest in the right-of-way was not a saleable interest in real property.

The next contention raised by the Auditor's office is that the Highway Department lacks authority to accept funds to be held in trust for local governments. The highway code, section 60-1-102, MCA, provides:

Legislative Policy and Intent. Consistent with the foregoing determinations and declarations, the legislature intends:

(1) to place a high degree of trust in the hands of those officials whose duties it is, within the limits of available funds, to plan, develop, operate, maintain, and protect the highway facilities of this state for present as well as future use;...

(2) to make the department of highways custodian of the federal-aid and state highways and to impose similar responsibilities upon the boards of county commissioners with respect to county roads and upon municipal officials with respect to the streets under their jurisdiction:



(3) the state shall have an integrated system of highways, roads, and streets, and that the department of highways, the counties, and municipalities assist and cooperate with each other to that end;

(4) to provide sufficiently broad authority to enable the highway officials at all levels of government to function adequately and efficiently in all areas of their respective responsibilities, subject to the limitations of the constitution and the legislative mandate hereinafter to be posed.

Section 60-2-201, MCA, provides:

The General Powers of Department. (1) The department may plan, layout, alter, construct, reconstruct, improve, repair, and maintain highways under the federal-aid systems of state highways.

(2) the department may cooperate and contract with counties and municipalities to provide assistance in performing these functions for other highways and streets.

(3) the department may review and approve projects for the installation of public works on state highway rights-of-way and authorize a county or municipality to let contracts related to such improvements.

It is clear from a reading of the above statutes that the department of highways has a very broad legislative mandate when it comes to the highway system. A high degree of authority is placed in the hands of the Department, coupled with an admonishment to cooperate with local governments.

Trusts may be established in many ways; no particular formalities are required under Montana law. They are a matter of intent, particularly that of the person creating the trust, the trustor, and the person selected to carry it out, the trustee. Trusts may be created orally, Stagg v. Stagg, 90 Mont. 180, 300 P. 538 (1931). All that the law demands is sufficient proof that the trust has in fact been created. Sections 72-20-107 and 72-20-108, MCA, provide:

72-20-107. Voluntary Trust--How Created as To Trustor. Subject to the provisions of 72-24-102, a voluntary trust is created, as to the trustor

and beneficiary by words or acts of the trustor indicating with reasonable certainty;

(1) an intention on the part of the trustor to create a trust; and

(2) the subject, purpose, and beneficiary of the trust.

72-20-108. Voluntary Trust--How Created As To Trustee. Subject to the provisions of 72-24-102, a voluntary trust is created as to the trustee by any words or acts of his indicating with reasonable certainty;

(1) his acceptance of the trust or his acknowledgement made upon sufficient consideration, of its existence; and

(2) the subject, purpose, and beneficiary of the trust.

There is nothing in Montana law to preclude the Department of Highways from serving as trustee with a local government as beneficiary for funds to be used for construction and maintenance of replacement facilities of a highway abandoned by the commission. Such function is in fact consistent with the broad authority and powers given to the Department and the mandate for cooperation with local governments.

The question arises as to the disposition of interest earned by a trust fund. That question has long been settled in Montana law. It is elementary that any interest earned by a trust belongs to the beneficiary and the trustee is compelled to apply it to that use. In re Davis' Estate, 47 Mont. 155, 134 P. 670 (1913); In re Allard Guardianship, 49 Mont. 219, 141 P. 661 (1914).

THEREFORE, IT IS MY OPINION:

1. The code provisions regarding abandonment are to be followed when the Highway Commission relinquishes a right-of-way easement.
2. The Highway Department has authority to hold funds in trust for a local government.

Very truly yours,

MIKE GREELY  
Attorney General