

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 40

COUNTIES - County commissioners' authority to permit private use pipeline on county road right-of-way;
COUNTY COMMISSIONERS - Authority to permit private use pipeline on county road right-of-way;
COUNTY GOVERNMENT - County commissioners' authority to permit private use pipeline on county road right-of-way;
OIL AND GAS - County commissioners' authority to permit private use pipeline on county road right-of-way;
MONTANA CODE ANNOTATED - Sections 7-1-2103, 7-14-2102, 7-14-2107(3), 69-13-103.

HELD: The board of county commissioners is statutorily charged with a significant amount of discretion in determining whether to permit the use of a county road right-of-way for the laying of permanent or temporary pipelines. However, this discretion is potentially limited by state regulation and further defined by the case law and statutes discussed in this opinion.

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17 November 1987

Arnie A. Hove
McCone County Attorney
McCone County Courthouse
Circle MT 59215

Dear Mr. Hove:

You have requested my opinion on the following:

Whether the board of commissioners has authority to permit the use of the county road rights-of-way for the laying of permanent or temporary pipelines or cable to private companies in view of section 7-14-2107(3), MCA, and Bolinger v. Bozeman, 158 Mont. 507, 493 P.2d 1062 (1972).

The authority of the commissioners over uses of the rights-of-way or county roads is contained in section 7-14-2107(3), MCA, which provides: "By taking or accepting interests in real property for county roads, the public acquires only the right-of-way and the incidents necessary to enjoying and maintaining it." This section does not delineate the parameters of the commissioners' legislative authority. There are two other statutes which provide some general direction. The first is section 7-14-2102, MCA, stating:

Each board of county commissioners may in its discretion do whatever may be necessary for the best interest of the county roads and the road districts. [Emphasis supplied.]

The second is section 7-1-2103, MCA, stating:

A county has power to:

....

(4) make such orders for the disposition or use of its property as the interests of its inhabitants require[.]

These statutes suggest that the county commissioners may exercise a significant amount of discretion. This discretion, however, is potentially affected by other state regulatory statutes, particularly those pertaining to pipeline carriers in Title 69, chapter 13, MCA. The potential applicability of these statutes is significant

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in that it serves as a reminder to the county commissioners that, depending upon facts not available in this request, other state departments' regulatory authority may potentially affect their freedom of discretion. See specifically § 69-13-103, MCA.

The principal Montana case suggesting limits to the commissioners' discretionary authority and examining section 7-14-2107(3), MCA, is Bolinger v. Bozeman, supra. In Bolinger, the Supreme Court conceded that rural roads may be used for constructing sewers and laying pipes for the transmission of "gas, water, and the like for public use."

Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public "highway easement," and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air. [Emphasis added.]

Id. at 515, 493 P.2d at 1066. The commissioners are charged with substantial discretion insofar as the public's interests are protected. Support for this assumption is contained in other statements accepted by the Bolinger court:

"We think that to use the street in a reasonable manner, and to a reasonable extent, for this purpose [placing telephone poles and lines along the streets] is just and proper, and is within the uses to which the street may lawfully be put, when such use is sanctioned by the public through its duly-authorized municipal agents."

Id. at 516, 493 P.2d at 1068.

Such use of the streets and highways is conducive to the public welfare and serves one of the purposes for which they are dedicated.

Id. at 518, 493 P.2d at 1068.

From Bolinger and the above-cited statutes there are four factors which I believe delineate the parameters of

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the authority of the county commissioners: First, the statutes clearly give the county commissioners broad discretion, stating "[e]ach board ... may in its discretion do whatever may be necessary for the best interest of the county roads and the road districts." § 7-14-2102, MCA. Second, this discretion is potentially limited by state-imposed regulations concerning pipeline carriers, but the extent of the limitations depends upon the applicability of those statutes to specific factual situations. Third, the board must find that its action is "necessary for the best interest of the county roads and the road districts" and does not "unreasonably impair the special easements of abutting owners in the street for purposes of access, light and air." Finally, the county commissioners must determine that the use is "conducive to the public welfare and serves one of the purposes for which [highways and streets] are dedicated."

These are the parameters within which the county commissioners are bound. Whether the private pipeline in the instant case is within these parameters is a matter for the commissioners to decide.

You also ask my opinion on the county's liability if it were to grant permission for the laying of pipelines. Questions of liability depend upon facts in a given situation. It is not appropriate to discuss liability in an Attorney General's Opinion.

THEREFORE, IT IS MY OPINION:

The board of county commissioners is statutorily charged with a significant amount of discretion in determining whether to permit the use of a county road right-of-way for the laying of permanent or temporary pipelines. However, this discretion is potentially limited by state regulation and further defined by the case law and statutes discussed in this opinion.

Very truly yours,

MIKE GREELY
Attorney General