

PUBLIC ROADS

Presenter: Susan Swimley with many thanks to Tara DePuy who is the brains behind the outfit!

Public road and public right of way

For purposes of discussion, please consider the “road” to be the surface traveled and the right of way the easement, dedication, right to use the surface together with the subjacent support structure for the road. Always consider the road may not be in the right of way!

How do you decide if this is a public road right of way?

1. Anyone can use it for any legal purpose that is not restricted by appropriate government authority. The Montana Legislature restricted use of public roads while under the influence of an intoxicating substance and Counties have the right, under certain circumstances to limit use such as weight or temporary closure;
2. The use can be expanded;
3. Fee ownership, granted easement, dedication or historic use does not limit use;
4. Authority and maintenance obligations may be State, Federal, County or Municipality;
5. A county road is a road opened, established, constructed, maintained, changed, abandoned or discontinued by the county in accordance with Title 7, chapter 14. Section 60-1-103, MCA.

There are exceptions: Montana Footpaths and Bicycle Trails Act of 1975 §60-3-301-304, MCA; and Easements negotiated by the State for a specific limited purposes (ie: logging).

Categories of Public Roads Rights of Way

Roads recognized by US Congress 1858 to 1877. There are various acts of Congress for various purposes.

R.S. 2477 -“right of way for the construction of highways over public lands, not reserved for public use”. Codified 1873 as Section 2477 of Revised Statutes and recodified 1938 as 43 U.S.C. §932.

US Government -

Department of Agriculture - Forest Service Roads - Roads wholly or partially within or adjacent to and serving National Forest System and necessary for the protection, administration, and use of the National Forest System and the use and development of resources. (23 USC 101).

There are temporary roads, permanent roads, public roads (23 USC 101(a), uninventoried roads (36 CFR 223.37), public lands highways and forest highways. ¹

Department of Interior – Bureau of Land Management
Department of Interior – Fish and Wildlife Services

Department of Interior – Bureau of Reclamation

¹ The categories and names may change depending upon region.

State Highways

The term highway, depending upon establishment of the road right of way, may be a County Road or may be under the jurisdiction of the State of Montana.

Until 1965 there were classes: common highway, main highway and state highway (RCM §32-104 (1947)).

In 1965, Montana codified the classifications of highways and roads. The code section currently reads: **60-1-201. Classification -- highways and roads.** (1) Public highways of this state are classified as follows:

- (a) federal-aid highways;
- (b) state highways;
- (c) county roads;
- (d) city streets.

(2) All highways that are not designated, selected, or established by the commission or constructed or maintained by the department may be designated as county roads or city streets upon the acceptance of the county or city.

(3) County roads are those that are opened, established, constructed, maintained, changed, abandoned, or discontinued by a county in accordance with Title 7, chapter 14, or that have been the subject of a request under 7-14-2622 and for which a legal route has been recognized by a district court as provided in 7-14-2622.

(4) City streets are those public highways under the jurisdiction of municipal officials.

County road means:

- (i) a road that is petitioned by freeholders, approved by resolution, and opened by a board of county commissioners in accordance with applicable laws;
- (ii) a road that is dedicated for public use in the county and approved by resolution by a board of county commissioners;
- (iii) a road that has been acquired by eminent domain pursuant to Title 70, chapter 30, and accepted by resolution as a county road by a board of county commissioners;
- (iv) a road that has been gained by the county in an exchange with the state as provided in 60-4-201; or
- (v) a road that has been the subject of a request under 7-14-2622 and for which a legal route has been recognized by a district court as provided in 7-14-2622.

How are County Roads Created?

- Petition
- Dedication and Acceptance
- Eminent Domain
- Transfer by State
- Resolution
- Recognition County Road by Court
- Easement/Right-of-Way
- Prescriptive Use

The Petition Process²

- A county road includes a road that is petitioned by freeholders, approved by resolution, and opened by a County Commission in accordance with Title 7. §7-14-2101(2)(b)(i), MCA.
- The petition must be signed by 10 freeholders in a road district. MCA §7-14-2601(1).
- The petition must set forth:
 - (1) the particular road or roads to be opened, established, constructed, changed, abandoned, or discontinued;
 - (2) the general route thereof;
 - (3) the lands and owners affected;
 - (4) whether the owners who can be found consent thereto;
 - (5) where consent is not given, the probable cost of the right-of-way;
 - (6) the necessity for and advantage of the petitioned action.

Section 7-14-2602, MCA.

- *Reid v. Park County* (1981), 627 P.2d 1210 which states that the record, as a whole, may be sufficient to prove a county road was created due to the fact that findings all of the records from a long time ago may be an insurmountable burden.
- At a regular or special meeting, within 30 days after the petition is filed, the County Commission shall cause an investigation of the feasibility, desirability, merits and demerits of the petition and the cost of granting the petition.
- Investigation is by one Commissioner and the County Surveyor.
- After considering the petition and the investigation results, the County Commission shall enter its decisions in the minutes. Section 7-14-2603, MCA.
- Damages must be estimated and paid to affected landowners out of the county road fund. If landowner refuses to accept damages, the County Attorney must institute eminent domain proceedings. Sections 7-14-2607 and -2608, MCA.
- Opening of road requires a resolution declaring the road to be a county road by the County Commission. Section 7-14-2605, MCA.
- With 10 days of the County Commission decision, certified notice must be mailed to all owners of land abutting the road. Section 7-14-2604, MCA.
- The findings of the County Commission, plat field notes, and report of surveyor are recorded in Clerk and Recorder's Office. Section 7-14-2614, MCA.
- The Clerk and Recorder notifies the County Road Supervisor of the proper district of the road and provides the Supervisor with a certified copy of the County Commission Resolution ordering the road opened. Section 7-14-2613, MCA.

Dedication and Acceptance

- A county road includes a road that has been dedicated for public use in the county and approved by resolution of the County Commission. §7-14-2101(2)(b)(ii), MCA.
- "Dedication" means the deliberate appropriation of land by an owner for any general and public use, reserving to the landowner no rights that are incompatible with the full exercise and enjoyment of the public use to which the property has been devoted. §76-3-103(3), MCA. See, also, *Smith v. Moran* (1985), 693 P.2d 1246.
- The interest a county acquires in a statutory dedication of a roadway, is the "equivalent of a right-of-way deed ... and incidents necessary to enjoying and maintaining the public highway." *Bailey v. Ravalli County* (1982), 653 P.2d 139, 142.

² Research the law of the year of the Petition—the laws varies.

Eminent Domain

- A county road includes a road that has been acquired by eminent domain pursuant to Title 70, chapter 30, and accepted by resolution as a county road by a County Commission. Section 7-14-2101(2) (b)(iii), MCA.
- A County Commission shall contract, agree for, purchase, or otherwise lawfully acquire rights-of-way for county roads over private property. It may institute proceedings under Title 70, chapter 30, paying for such right-of-way from the county road fund. Section 7-14-2107(1), MCA.
- Eminent domain requires a proper petition under the petition process in §7-14-2602, MCA. See §7-14-2107(2) MCA and *Madison County v. Elford* (1983), 661 P.2d 1266, 203 Mont. 293.
- When a right-of-way is condemned pursuant to Title 70, chapter 30, a certified copy of the judgment of the court must be made. The copy must then be filed in the office of the clerk of the county where the land is located.
- The judgment must particularly describe the land. Section 7-14-2108(2) and (3), MCA.

Transfer by State

- A road that is abandoned by the state may be designated as a county road upon the acceptance and approval by resolution of a County Commission. § 7-14-2101(3)(c), MCA.
- A road that is gained in an exchange with the State. Section 60-4-201, MCA.

Resolution - Section 7-14-2101(2), MCA

- Following a public hearing, a County Commission may accept by resolution a road that has not previously been considered a county road but that has been laid out, constructed, and maintained with state department of transportation or county funds.
- A survey is not required of an existing county road that is accepted by resolution by a County Commission.

Right of Way Voluntarily Given or Purchased - Section 7-14-2108, MCA

- When a right-of-way is voluntarily given or purchased, a written instrument conveying the right-of-way and incidents to the right-of-way must be signed and acknowledged by the person making it. The instrument must then be recorded in the office of the clerk of the county where the land is located. The instrument must particularly describe the land. Section 7-14-2108, MCA.

Recognition County Road by Court - Section 7-14-2622, MCA – enacted 2009

- The county commission or a directly affected person, if the person has appeared before a regular meeting of the county commission to notify the commission of the person's intent, may request that a district court recognize a route of a county road that is maintained by the county and used by the public as the legal route if any of the following conditions exist:
 - (a) there is doubt about the legal establishment or evidence of establishment of the county road;
 - (b) the location of the county road cannot be accurately determined because of:
 - (i) numerous alterations to the road;
 - (ii) a defective survey of the road or adjacent property; or
 - (iii) loss or destruction of the original survey of the road; or
 - (c) the road as traveled and used for 10 years or more does not conform to the location of the road as described in county records.
- The county commission or the directly affected person requesting recognition of a route shall provide to the court:

- (a) the reason for the request and the condition that exists;
 - (b) the location of the portion of the road that is the subject of the request;
 - (c) any maps or historical use information that may assist the court in determining whether or not to recognize a route; and
 - (d) any other information requested by the court.
- Upon receipt of a request and consideration of the information provided and any other information that the court considers appropriate, the court may recognize a route of a county road as the legal route. The route as recognized by the court is considered to be a county road.
 - The court shall provide notice and the opportunity for a public hearing to affected landowners, the county commission, and directly affected persons before recognizing or declining to recognize a route of a county road as the legal route.
 - This process does not apply to county roads established by prescriptive easement.

Easement/Right-of-Way

- County Commission shall contract, agree for, purchase, or otherwise lawfully acquire rights-of-way for county roads over private property. It may institute proceedings under Title 70, chapter 30, paying for such right-of-way from the county road fund.
- County Commission shall acquire rights-of-way for county roads and discontinue or abandon them only upon proper petition.
- 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. Section 7-14-2107, MCA.
- When a right-of-way is voluntarily given or purchased, a written instrument conveying the right-of-way and incidents to the right-of-way must be signed and acknowledged by the person making it. The instrument must then be recorded in the local Clerk/Recorder's Office.
- When a right-of-way is condemned pursuant to Title 70, chapter 30, a certified copy of the judgment must be made and filed in the local County Clerk and Recorder's Office.
- Both types of instruments must particularly describe the land. Section 7-14-2108, MCA.

Prescriptive Use

- A county road can be created by prescriptive use of a road by the public for purposes other than just recreational uses.
- Prescriptive use which establishes a county road can only be determined by a Court.
- Prescriptive use is determined on the facts particular to that road.
 - Use of road must be notorious.
- The following factual elements must be established:
 - Road must be open to the public.
 - Use of road must be adverse to landowner.
 - Use of road must be continuous and uninterrupted for the complete statutory time period. *Leffingwell v. Park County* (1996), 916 P.2d 751.
- Statutory time periods for which road must have been used by the public depend on date of use.
 - 1865-1877 3 years
 - 1877–1895 5 years
 - 1895-1913 Not Applicable
 - 1895-1953 10 years
 - 1953-present 5 years (Section 70-19-404 and 405, MCA)

- A prescriptive use county road can be extinguished by reverse adverse possession by a landowner. *Dome Mountain v. Park County* (2001), 37 P.3d 310.
- County road established by prescriptive use is only as wide as the width of the historical use. *See Ruana v. Grigonis* (1996), 913 P.2d 1247.
- A prescriptive county road is not limited to the historic use through which the road was acquired. The scope includes public uses that are reasonably incident to the use through which the easement was acquired and uses that are reasonably foreseeable. *PLAAI v. Madison County Commissioners*, 321 P.3d 38.
- In a public road right-of-way established by prescription, the areas necessary to support and maintain the road, as well as the land needed to make the road safe and convenient for public use are included in the public right-of-way. *PLAAI v. Madison County Commissioners*, 321 P.3d 38.

See, also, Section 7-14-2101(2) (b), MCA.

City Streets and Alleys

Relief of the Inhabitants of Cities and Towns Upon the Public Lands Act of March 2, 1867, chapt. 177, 14 Stat. 541 (1867) was the US Congressional act that granted the settlement and occupancy of public lands as a townsite. In the same year the Montana Territorial Legislature enacted Act Relative to the Pre-Emption of Town Sites Upon Public Lands. 1867 Laws 60.

Section 4 of Laws 60 required the town site to be surveyed in blocks, lots, streets and alleys with the survey required to be filed in the office of county recorder and thereafter “the streets and alleys designated in such plat shall remain dedicated to the public use forever.”

Before 1883 no statutory authority indicated the nature of ownership under the street.

1883-1895 – fee transferred to municipality

After 1895- 1973 unclear- probably easement - the lands included in all streets, avenues, and alleys are donated to the use of the public forever.

1973- Montana Subdivision and Platting Act enacted.

Research Tips

- Research law at the time it is believed a road became a county road.
- Research county road maintenance records.
- Research old maps showing county roads.
- Research gas tax records/maps.
- Research local museum records, especially for photographs of roads.
- Research old school district records.
- Research commissioner minutes, resolutions. May be in another county.
- Depose the “old timers”.
- Research geo-yellow cards in assessor’s office.

Laying Out/Alteration/Abandonment of County Roads

1. County roads to be laid out and opened when practicable upon subdivision or section lines, Section 7-14-2111, MCA.
2. Width to be 60 feet unless a greater or smaller width is ordered by board of county commissioners on petition of an interested person, Section 7-14-2112, MCA.
3. County road may be temporarily limited or closed when necessary in order to preserve or repair roads or if unsafe. Road must be signed while limited or closed. Section 7-14-2127, MCA.
4. Board County Commissioners may designate a portion of a county road an emergency area if increased traffic due to a construction project threatens public safety. Notice of the designation shall be printed in a newspaper and post the area road. Section 7-14-2128, MCA.
5. Any 10 freeholders may petition County Board Commissioners in writing to open, establish, contract, change, abandon or discontinue any county road. Section 7-14-2601, MCA. Statutes set forth what must be in petition and process to be followed, Section 7-14-2602, et seq. MCA.
 - a. Petition must set out: particular road to be abandoned or discontinued; general route thereof; lands and owners affected; whether the owners who can be found consent; the necessity for and the advantage of the petitioned action.
 - b. The Board may not abandon a county road or right of way used to provide existing legal access to public land or waters including access for public recreational use as defined by 23-2-301 and as permitted by 23-2-302, unless another public road or right of way provides substantially the same access. 7-14-2615(3).
 - c. The Board may not abandon a county road or right of way used to access private land if the access benefits two or more landowners unless all of the landowners agree to the abandonment. 7-14-2615(4).
6. County roads can only be abandoned by operation of law, judgment of court or order of board.
7. Streets or alleys in an unincorporated town may also be discontinued if all owners of lots on street or alley agree and there is no detriment to public interest. Only 75% of lot owners required if street or alley to be closed for school purposes. Section 7-14-2616, MCA.
8. County commissioners may grant to any person, association, or corporation the right to construct and maintain a pipeline for natural or artificial gas, water or any other substance in, along and under any county road for the use of any county, city, or town or the inhabitants thereof. Section 7-13-2101, MCA.

WHAT ARE SUBDIVISION ROAD?

Tara DePuy, Land Use Attorney for MACo/JPIA

What are Subdivision Roads?

Subdivision Roads in context of this presentation refer to streets, roads, and alleys contained within a platted subdivision; not access to the platted subdivision boundaries.

A. Montana Subdivision and Platting Act, Title 76, Chapter 3 (enacted July 1, 1973)

- 76-3-102 Statement of Purpose, includes:
"lessen congestion in the streets and highways" and
"provide for ingress and egress".
- 76-3-103 Definitions do not include definition for streets, roads, alleys but do state: "plat means a geographical representation of a subdivision showing the division of land into lots, parcels, blocks, streets, alleys, and other divisions and dedications".
- 76-3-502 Local Subdivisions regulations must include:
"coordination of roads within subdivided land with other roads, both existing and planned"
"**dedication** of lands for roadways and for public utility easements"
"the improvement of roads"
"the provision for adequate travel".
- 76-3-103 defines "Dedication" as the deliberate appropriation of land by an owner for any general and public use, reserving to the landowner no rights that are incompatible with the full exercise and enjoyment of the public use to which the property has been devoted. *See, also, Smith v. Moran* (1985), 693 P.2d 1246.
- 76-3-504 Subdivision regulations must, at a minimum, include:
"prescribe standards for the design and arrangement of lots, streets and roads".

B. Title 7, Chapter 14 does not use the words "subdivision road".

Types of Subdivision Roads

A. Dedicated to the Public – Public Road

- Example of dedication:

I/We, the undersigned property owner(s), do hereby certify that I/we have caused to be surveyed, subdivided and platted into lots, blocks, roads and alleys, as shown by the plat hereto annexed, the following described land situated in Flathead County Montana, to-wit:

(Exterior boundary description of area contained in plat and total acreage)

The above described tract of land is to be known and designated as (Name of Subdivision), and the lands included in all roads, avenues and alleys shown on said plat are **hereby granted**

and donated to the use of the public forever. *The roadways dedicated to the public are accepted for public use, but the County accepts no responsibility for maintaining the same. The owner(s) agree(s) that the County has no obligation to maintain the roads hereby dedicated to the public use.*

- Public Road Maintenance Should be Addressed During Subdivision Review, including:
 - Homeowners Association Maintenance
 - Private Road Maintenance Agreements
 - RSIDs/Waivers

- Public Road Ownership Should be Addressed During Subdivision Review
 - Lot Owners Own to Middle of Public Roads
 - Public Roads are Deed to Home Owners Association

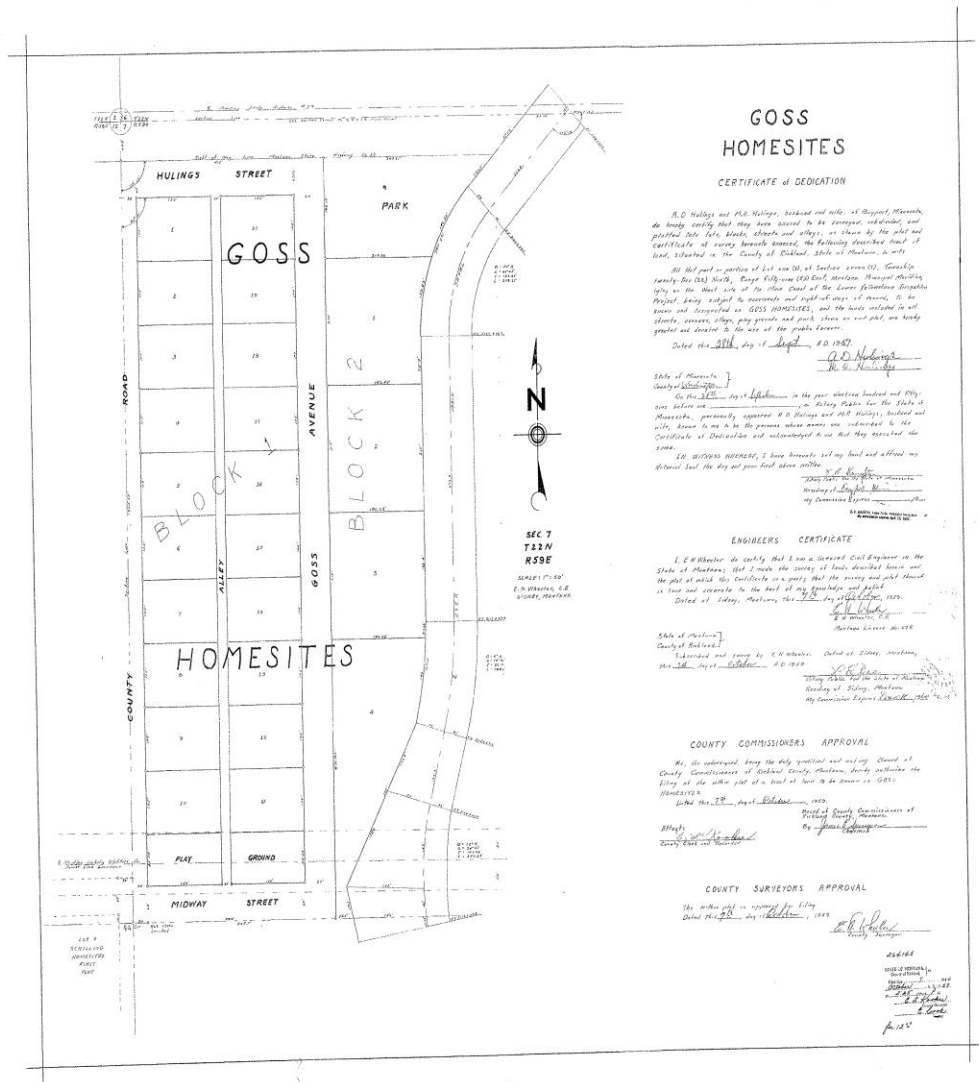
B. Accepted by the County – County Road

- A county road includes a road that has been dedicated for public use in the county and **approved by resolution of the County Commission.** Section 7-14-2101(2)(b)(ii), MCA.

- Resolution requirements. 7-5-121, MCA.
 - (1) All resolutions shall be submitted in the form prescribed by resolution of the governing body.
 - (2) Resolutions may be submitted and adopted at a single meeting of the governing body.
 - (3) After passage and approval, all resolutions shall be entered into the minutes and signed by the chairperson of the governing body.

- If County "Accepts" Public Road on a Subdivision Plat does that satisfy 7-5-121?

Subdivision Roads that Predate the Montana Subdivision and Platting Act (July 1, 1973)



GOSS HOMESITES

CERTIFICATE OF DEDICATION

A. D. Hulings and P. M. Hulings, husband and wife, of Big Horn, Montana, do hereby certify that they have caused to be surveyed, subdivided, and platting this city, block, streets and alleys, as shown by the plat and certificate of survey herewith annexed, the following described tract of land, situated in the County of Richland, State of Montana, to wit:

All that part or portion of 2 1/2 acre (2 1/2) of Section 10, Township 12 North, Range 9 East, of the 6th Principal Meridian, lying on the West side of the 1/4 Mile East of the Lower Yellowstone Forestry Project, being subject to easements and right-of-way of mining, to the same and designated as GOSS HOMESITES, and the lands included in well streets, avenues, alleys, ways, grounds and park shown on said plat, are hereby granted and dedicated to the use of the public forever.

Dated this 28th day of August, A.D. 1957.

A. D. Hulings
P. M. Hulings

State of Montana }
County of Richland }
On this 28th day of August, 1957, in the presence of me and my assistants, the undersigned, personally appeared A. D. Hulings and P. M. Hulings, husband and wife, known to me to be the persons whose names are subscribed to the Certificate of Dedication, and acknowledged to me that they executed the same.

In WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this day and year first above written.

ENGINEERS CERTIFICATE

I, E. W. Wheeler, do hereby certify that I am a Licensed Civil Engineer in the State of Montana, that I made the survey of lands described herein and the plat of said lands, and that the survey and plat shown is true and correct to the best of my knowledge and belief.

Dated at Big Horn, Montana, this 28th day of August, 1957.

E. W. Wheeler
Engineer License No. 152

State of Montana }
County of Richland }
Subscribed and sworn to by E. W. Wheeler, Deput. of County, Montana,
this 28th day of August, A.D. 1957.

COUNTY COMMISSIONERS APPROVAL

We, the undersigned, being the duly qualified and acting Board of County Commissioners of Richland County, Montana, hereby authorize the filing of the within plat of a tract of land to be shown as GOSS HOMESITES.

Dated this 28th day of August, 1957.

By: [Signature]
County Clerk and Recorder

COUNTY SURVEYORS APPROVAL

The within plat is correct to filing.

Dated this 28th day of August, 1957.

[Signature]
County Surveyor

GOSS HOMESITES

CERTIFICATE of DEDICATION

A. D. Hulings and M. H. Hulings, husband and wife, of Bayport, Minnesota, do hereby certify that they have caused to be surveyed, subdivided, and platted into lots, blocks, streets and alleys, as shown by the plat and certificate of survey herewith annexed, the following described tract of land, situated in the County of Richland, State of Montana, to-wit:

All that part or portion of Lot one (1), of Section seven (7), Township twenty-two (22) North, Range fifty-nine (59) East, Montana Principal Meridian, lying on the West side of the Main Canal of the Lower Yellowstone Irrigation Project, being subject to easements and right-of-ways of record, to be known and designated as GOSS HOMESITES, and the lands included in all streets, avenues, alleys, play grounds and park shown on said plat, are hereby granted and donated to the use of the public forever.

Dated this 28th day of Sept, A.D. 1959.

A. D. Hulings
M. H. Hulings

State of Minnesota }
 County of St. Louis }

On this 28th day of Sept in the year nineteen hundred and fifty-nine before me _____, a Notary Public for the State of Minnesota, personally appeared A. D. Hulings and M. H. Hulings, husband and wife, known to me to be the persons whose names are subscribed to the Certificate of Dedication and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

S. B. K...
 Notary Public for the State of Minnesota
 Residing at Bayport, Minn.
 My Commission Expires 10

E. N. WHEELER, 1959 PUBLIC NOTARIAL COMMISSION, MONTANA
 MY COMMISSION EXPIRES APRIL 15, 1961.

ENGINEERS CERTIFICATE

I, E. N. Wheeler do certify that I am a licensed Civil Engineer in the State of Montana; that I made the survey of lands described herein and the plat of which this Certificate is a part; that the survey and plat thereof is true and accurate to the best of my knowledge and belief.

Dated at Sidney, Montana, this 7th day of October, 1959.

E. N. Wheeler
 E. N. Wheeler, C.E.
 Montana License No. 47E

State of Montana }
 County of Richland }

Subscribed and sworn by E. N. Wheeler. Dated at Sidney, Montana, this 7th day of October, A.D. 1959.

J. E. P...
 Notary Public for the State of Montana
 Residing at Sidney, Montana
 My Commission Expires 10/20/60

COUNTY COMMISSIONERS APPROVAL

We, the undersigned, being the duly qualified and acting Board of County Commissioners of Richland County, Montana, hereby authorize the filing of the within plat of a tract of land to be known as GOSS HOMESITES.

Dated this 7th day of October, 1959.

Board of County Commissioners of
 Richland County, Montana.
 By James E. ...
 Chairman

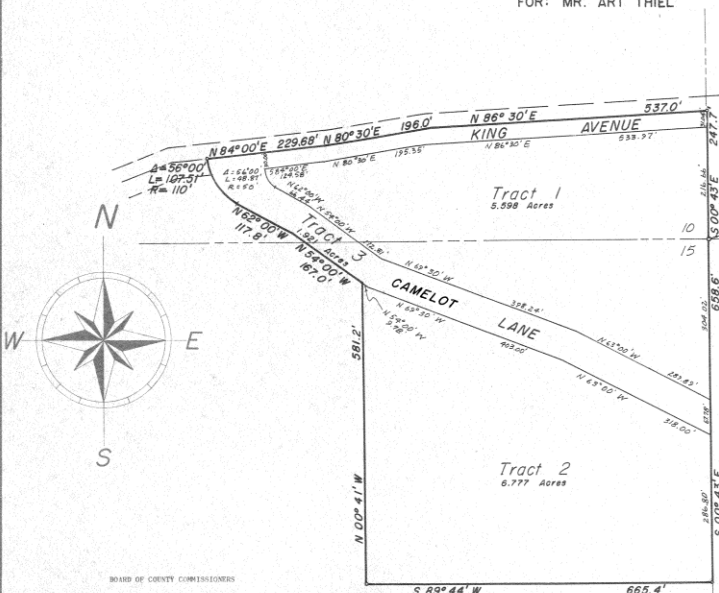
Attest:
E. ...
 County Clerk and Recorder

COUNTY SURVEYORS APPROVAL

The within plat is approved for filing
 Dated this 7th day of October, 1959.

E. N. Wheeler
 County Surveyor

PLAT OF
CERTIFICATE OF SURVEY NO. 1181
 LOCATED IN THE E $\frac{1}{2}$ E $\frac{1}{2}$ OF SECTIONS 10 & 15 T-1S, R-24E, M.P.M.
 YELLOWSTONE COUNTY, MONTANA
 PLAT & SURVEY BY: SAGE ENGINEERS & LAND PLANNERS, INC.
 SCALE: 1"=100'
 MARCH, 1971
 FOR: MR. ART THIEL



CERTIFICATE OF RECOMMENDATION
 The CITY-COUNTY PLANNING BOARD hereby recommends that the attached Certificate of Survey be approved for filing by the BOARD OF COUNTY COMMISSIONERS, 5/15/71.

Thiel on behalf
 Planning Board Secretary

H. J. ...
 Planning Board President

CERTIFICATE OF SURVEY
 STATE OF MONTANA }
 County of Yellowstone } ss.
 James B. O'Brien, Montana Professional Engineer and Land Surveyor #613-ES, being first duly sworn, deposes and says that during the month of March, 1971, a survey was made under his supervision of two tracts of land located in the SE 1/4 of sections 10 & 15, T-1S, R-24E, M.P.M., Yellowstone County, Montana, said tracts of land being more particularly described as follows, to wit:

1 Beginning at the NW Corner of Section 15 & the SE Corner of Section 10, T-1S, R-24E, M.P.M.; thence 000°43'E along the East line of Section 15 a distance of 659.6 feet; thence 089°44'W along the South line of the NW 1/4 NW 1/4 of Section 15 a distance of 665.4 feet; thence 000°41'W along the West line of said NW 1/4 NW 1/4 a distance of 591.2 feet; thence 089°44'W along the South 1/2W line of Tract 1 a distance of 167.0 feet; thence 002°00'W along said 1/2W a distance of 117.8 feet to a point of curve of a circular curve to the right with a radius of 110.0 feet; thence following said curve a distance of 107.55 feet to the center line of King Avenue; thence 000°41'W along said center line a distance of 229.68 feet; thence 000°41'W along said center line a distance of 136.0 feet; thence 000°43'E along the East line of Section 10 a distance of 247.7 feet to the point of beginning containing 14.296 acres.

That said survey and the plat hereof shows true and correct dimensions and that the plat conforms with the work on the ground.

578564 Dated this 19th day of March, 1971.

STATE OF MONTANA }
 County of Yellowstone } ss.
 I, *James B. O'Brien*, being first duly sworn, depose and say that I am the duly qualified and acting Surveyor of the County of Yellowstone, State of Montana, and that I have read the foregoing Certificate of Survey and the plat hereof, and that the same is correct and true and that the same conforms with the work on the ground.

Subscribed and sworn to before me, a Notary Public, in and for the State of Montana, this 19th day of March, 1971.

James B. O'Brien
 Professional Engineer and Land Surveyor
 Montana Registration #613-ES

BOARD OF COUNTY COMMISSIONERS
 Since this plat describes two irregularly shaped tracts of farming land, we approve it for filing.

Art Thiel
 Chairman

...
 Commissioner

CHECKED IN COUNTY SURVEYOR'S OFFICE
 March 15, 1971 by *J. J. ...*

Notary Public in and for the State of Montana
 Residing at Billings, Montana
 My commission expires April 18, 1971

BOARD OF COUNTY COMMISSIONERS

Since this plat describes two irregularly shaped tracts of farming land, we approve it for filing.

Art Thiel
 Chairman

...
 Commissioner

QUESTIONS SUBMITTED

RULE #1 – your attorney is YOUR COUNTY / CITY ATTORNEY. If he or she says something different, then that is the law of your County or City!

RULE #2- attorneys always answer questions with question.

RULE #3 – the diaper answer always applies: IT DEPENDS.

1. Are there any laws making it illegal to run over a traffic cone or other lane control device? We got back that there are none, only a reckless driving citation – do let me know if you come up with anything.

As with all issues, the response is fact based. Did anyone see who (the person) ran over the cone or lane control devise? The first issue for a prosecutor is being able to accuse a person (the driver) and then *prove beyond a reasonable doubt* that the driver committed the action for which the person is accused.

Possible charges:

Reckless Driving 61-8-301, MCA – operate a vehicle in willful/wanton disregard for public safety.

Careless Driving 61-8-302, MCA – operate a vehicle less than careful and prudent manner as to unduly or unreasonably endanger life, limb, or property of others.

Construction Zone Violation – 61-8-314, MCA (boundaries of work zone must not be more than 500 feet both sides of working area).

Criminal Mischief – 45-6-101, MCA, - knowingly and purposely damage or destroy property of another without consent.

2. Who is responsible for removing all the illegally posted signs on any highway open to the public?

My first question back what type of “highway” is this?

60-1-201. Classification -- highways and roads. (1) Public highways of this state are classified as follows:

- (a) federal-aid highways;
- (b) state highways;
- (c) county roads;
- (d) city streets.

(2) All highways that are not designated, selected, or established by the commission or constructed or maintained by the department *may* be designated as county roads or city streets upon the acceptance of the county or city.

Does it include every road open and dedicated to the public? **61-8-210. Display of unauthorized signs, signals, or markings.** (1) No person shall place, maintain, or display upon or in view of any highway any unauthorized sign, signal, marking, or device which purports to be or is an imitation of or resembles an official traffic-control device or railroad sign, or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any official traffic-control device or any railroad sign or signal.

(2) No person shall place or maintain nor shall any public authority permit upon any highway any traffic sign or signal bearing thereon any commercial advertising.

(3) This section shall not be deemed to prohibit the erection upon private property adjacent to highways of signs giving useful directional information and of a type that cannot be mistaken for official signs.

(4) The prohibition of this section shall not apply to portable "Caution" signs placed in the vicinity of schools at those times during which school children are going to and coming from school.

61-8-706. Removal of unauthorized sign. (1) An unauthorized sign, emblem, marker, or traffic control device or portion thereof encroaching into, over, or upon a right-of-way of a state highway or controlled-access highway is a public nuisance, and the department* may remove it or cause it to be removed without notice and without liability for the removal.

(2) Every sign, signal, or marking prohibited by 61-8-210 is hereby declared to be a public nuisance and the authority having jurisdiction over the highway is hereby empowered to remove the same or cause it to be removed without notice.

* Department is defined in 61-1-101(16) as the department of justice acting directly or through its duly authorized officers or agents.

Is the sign an "encroachment on a County Road"?

7-14-2134. Removal of highway encroachment. (1) Except as clarified in 23-2-312 and 23-2-313 and except as provided in subsection (4) of this section, if any highway is encroached upon by fence, building, or otherwise, the road supervisor or county surveyor of the district must give notice, orally or in writing, requiring the encroachment to be removed from the highway.

(2) If the encroachment obstructs and prevents the use of the highway for vehicles, the road supervisor or county surveyor shall immediately remove the encroachment.

(3) The board of county commissioners may at any time order the road supervisor or county surveyor to immediately remove any encroachment.

(4) This section does not apply to a fence for livestock control or property management that is in a county road right-of-way and that is attached to or abuts a county road bridge edge, guardrail, or abutment if the fence and bridge appurtenances are not on the roadway, as defined in 61-1-101. Any fence described in this subsection must comply with 23-2-313.

3. I have a question about ownership in the roadway. The problem we have here is with the farmers ditches and culverts they use for irrigation. In our policy plans it shows that the county is only responsible for natural water drainage only. If you look at the irrigation districts wordage it says that the ditches were installed before the roads were, however there is nothing stating when the irrigation ditches were established in our records. Plus, now the people who use the ditches are wanting bigger pipes under the road so have more water for their fields. It's an ongoing battle around here with this problem. I have asked the irrigation district to pay for half the cost of the replacement, but I always hear that it's not in their budget and there is now a lot of the culverts failing. These culverts range all different sizes from 18" to 8' and 30' to 100' long from metal to concrete so we are talking thousands of dollars here to get them back into good safety standards! ***So the question I would have is who is responsible for these culverts when there is nothing in the road records about them? Does the county assume all responsibility then?***

There are so many issues here.

What is this policy plans?

Irrigation Districts (85-7-101 et seq.), Drainage Districts 85-8-101), Water User Associations (85-6-101), ditch company (possibly Montana non-profit corporation that issues shares for use of water) and rights of water rights holders are all different and have different funding mechanisms.

The Montana Attorney General, in 1979, interpreted the term "bridge" by looking at various parts of Montana law from tax provisions, to determine that "the duty to build bridges imposed by 7-14-2204(1), MCA includes the duty to install culverts when such devices are deemed most appropriate for conveying water beneath a public street or highway". 38 A.G. Op 39 (1979).

The same opinion found that irrigation ditches are effectively "natural streams" for purposes of legal interpretation. If the stream/ditch was there first, then the County pays for the building and maintaining of the culvert.

7-14-2204. Construction and maintenance of bridges in municipalities. (1) 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.

(2) The city or town in which any such bridge is situated shall pay the whole or such part, not less than one-half, to be determined by the board, of the cost of planking, replanking, paving, or repaving the bridge. The city or town shall construct and maintain in good repair the bridge approaches.

(3) Such bridges and all persons on them shall be subject to the reasonable police regulations of the city or town in which any such bridge is situated.

Who has responsibility when your County does not have records? How much do you want to pay

lawyers to fight about it?

Bigger culverts to carry more water?

4. MDT state highway such as US Hwy 87 and County road intersections, who is liable if residents get stuck in the snow removed from the highway and block the approaches of the county road. The state row is at least 60-80 or sometimes 120 which would include the approach. This question always comes up during snow plowing.

There is no obligation for State or County to plow snow. The State leaves a "berm" of snow across the County Road approach. How deep does the State R-O-W or approach extend toward the County Road? Is it really on the County Road?

Who is liable for anyone getting stuck?

OR is the real question can you tell the angry citizen to call to complain?

5. If a property owner has a tree on private property that is overhanging in to the county maintained road easement, who is responsible for removing the encumbrance?

Again this is a fact based answer. How is the tree an encumbrance? Notice of encumbrance Trimming issues.

7-14-2133. Removal of obstructions on county roads. (1) When a county road becomes obstructed, the board of county commissioners, or the county surveyor if the surveyor is in charge, shall remove the obstruction upon being notified of the obstruction.

(2) This section does not hold the board or any member responsible or liable for anything other than willful, intentional neglect or failure to act.

(3) For the purposes of this section, "obstruction" means an obstacle, such as a rock or a fallen tree, that if not removed would remain in the road indefinitely. The word does not mean snow, ice, or any other obstacle that will melt or dissipate on its own accord.

7-14-2135. Notice to remove encroachment. (1) Notice to remove the encroachment immediately, specifying the breadth of the highway and the place and extent of the encroachment, must be given to the occupant or owner of the land or the person owning or causing the encroachment.

(2) Notice must be given in the following manner: (a) by leaving it at the occupant's or owner's place of residence if the person resides in the county; or (b) by posting it on the encroachment if the person does not reside in the county.

7-14-2136. Penalty for failure to remove encroachment promptly. If the encroachment is not removed immediately or removal is not diligently conducted, the one who causes, owns, or controls the encroachment is liable to a penalty of \$10 for each day the same continues.

7-14-2137. Legal actions to remove encroachments or recover costs. (1) (a) If the encroachment is denied, the road supervisor shall commence an action in the proper court to abate the encroachment as a nuisance.

(b) If the road supervisor recovers judgment, the supervisor may have the supervisor's costs and \$10 for each day the nuisance remains after notice.

(2) (a) If the encroachment is not denied and is not removed for 5 days after notice is complete, the road supervisor or county surveyor may remove it at the expense of the owner or occupant of the land or of the person owning or controlling the encroachment.

(b) The supervisor may recover the expense of removal, \$10 for each day the encroachment remains after notice, and costs in an action brought for that purpose.

6. If there is a site distance issue at an intersection due to a landowner's landscaping or fencing on private property out of the intersection, does the County have any authority or legal obligations to require trimming or removal of obstructions?

What type of public road are the roads that intersect? How wide is the easement(s)? Is there traffic control? I have only seen site triangles in Subdivision Regulations and zoning. Enact zoning or possibly condemn the land.

7. Do Counties have financial responsibilities for vehicles that are impacted by poor road conditions, ie. potholes, corrugated (washboard) gravel roads?

No, unless the County has acknowledged the road is substandard and has collected funds to improve the road ie: take someone's money and not fix it.

8. Flathead County has multiple ways that our roads are classified for their creation such as declared by petition, deeded and declared, deeded, dedicated, platted etc. The current MCA says we are supposed to have our roads through easement from the adjacent landowner. With some of our roads owned by Flathead County with a fee simple deed do we really own the land/road? I've heard that an attorney in Missoula (who I understand is very well respected in road law) says that we really don't "own" the road/land even though we have a deed.

Peter Dayton and I disagree a few issues. If the County has a deed which the County has accepted, the County owns the land under the road surface.

60-1-201. Classification -- highways and roads. (1) Public highways of this state are classified as follows: (2) All highways that are not designated, selected, or established by the commission or constructed or maintained by the department may be designated as county roads or city streets upon the acceptance of the county or city.

7-14-2107. Acquisition of right-of-way. (1) Each board of county commissioners shall contract, agree for, purchase, or otherwise lawfully acquire right-of-way for county roads over private property. It may institute proceedings under Title 70, chapter 30, paying for such right-of-way from the county road fund.

(2) Each board shall acquire rights-of-way for county roads and discontinue or abandon them only upon proper petition therefor.

(3) 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.

7-14-2108. Recording of instruments related to acquisition of right-of-way. (1) When a right-

of-way is voluntarily given or purchased, an instrument in writing conveying the right-of-way and incidents thereto must be signed and acknowledged by the person making it. It must then be recorded in the office of the clerk of the county where the land is located.

(2) When a right-of-way is condemned, a certified copy of the judgment of the court must be made. It must then be filed in the office of the clerk of the county where the land is located.

(3) Both types of instruments shall particularly describe the land.

9. Are there any use limitations to a public prescriptive easement? In other words, would approving a subdivision along a road that was created by a public prescriptive easement ever be wrongfully or unlawfully increasing the burden on the easement? This is just a question as to use, it is not an expansion of the size of the road easement.

Has this easement been declared by a court?

The public has the right to use a declared prescriptive public road easement in any manner not contrary to the declaration. (PLAA v. Madison County).

10. I would like to know the how counties stand as far as liability on car gates or cattle guards in county roads. Two points being. 1. Example (20 ft. car gate was installed "10 years ago"). Now with increased traffic, size and road wear road is now wider than the car gate.

How does a County put a gate on a County Road?

Check with insurance carrier? Is it the gate signed?

2. When these car gates are fenced up to the by landowners use a big post on either end to tie up to. This county the landowner buys the car gate. The county installed it in the road and maintains it. Landowner fences up to it. A lot of these car gates were installed years ago when traffic was lighter and smaller. Roads at that time did only average about 20 ft. in width. Now roads are wider say 24 to 26 ft. giving 2 to 3 ft. on either side. How or are we liable if someone drives off that edge or hits those said end posts?

Cattleguards— liability for cleaning.

11. I have a question most counties own the right of way for their roads, in some form. [REALLY?] Utility companies get a crossing permit to bore or dig. In most cases call for locate, and come to find out utility company does not have enough cover for me to do my work. My road, what can be done and where does the liability lie. If need some scenarios I can give some.

As I understand the issue, the Utility Company is getting an approved encroachment permit.

During regular maintenance the County discovers the line is not deep enough b/c it is hit.