

## 48 Op. Att'y Gen. No. 13

COUNTY COMMISSIONERS - Authority over regulation of county roads;

HIGHWAYS - Bridge as an extension of the public highway;

HIGHWAYS - Use of county road easement;

WATER AND WATERWAYS - Access to streams and rivers from county roads and bridges;

MONTANA CODE ANNOTATED - Sections 7-14-2101(e), -2102, -2103, -2107, -2112(1), -2615(4), 60-1-103, -201, 61-8-353, 61-12-101;

MONTANA CODES ANNOTATED, 1895 - Political Code § 2620;

MONTANA CONSTITUTION, Article IX, section 3;

REVISED CODES OF MONTANA, 1947 - Sections 32-106, -107, -2808.

HELD:

1. Use of a county road right-of-way to gain access to streams and rivers is consistent with and reasonably incidental to the public's right to travel on county roads.
2. A bridge and its abutments are a part of the public highway, and are subject to the same public easement of passage as the highway to which they are attached. Therefore, the public may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments.
3. A member of the public must stay within the road and bridge easement to gain access to streams and rivers. Absent definition in the easement or deed to the contrary, the width of a bridge right-of-way easement is the same as the public highway to which it is attached.
4. Access to streams and rivers from county roads and bridges is subject to the valid exercise of the county commission's police power and its statutory power to manage county roads.
5. Access to streams and rivers from county roads and bridges created by prescription is dependent upon the uses of the road during the prescriptive period.

May 26, 2000

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Dear Mr. Graham and Mr. Zenker:

You have requested my opinion on the following question:

May a member of the recreating public gain access from the right-of-way of a public road at a bridge crossing to a stream or river between the ordinary high-water marks?

Your opinion request evolved through a series of controversies between the recreating public and riparian landowners along the Ruby River in Madison County. Recreationists assert that they may use county road bridge crossings as access points to fish and float the Ruby River. Individual landowners have asserted that the public does not have access, and have requested that local law enforcement and the wardens employed by the Department of Fish, Wildlife and Parks cite the public for trespass when the recreationists gain access to the Ruby through the use of bridge crossings. You are seeking guidance as to whether the game wardens and local law enforcement should cite the recreating public for trespass.

As a supplement to your original opinion request, you have provided information concerning three roads and bridges crossing the Ruby River in Madison County:

1. The Todd Bridge on County Road No. 169. County Road No. 169 was created by petition and approved by the Madison County Commission in September 1907. In 1910, the right-of-way was purchased by Madison County from the owner of the underlying estate for \$300.
2. The Water Street Bridge, on County Road No. 59. County Road No. 59 was also created by petition and approved by the Madison County Commission, in June 1889.
3. The Seylor Bridge on Seylor Road (known locally as the "Eastside Road"). You believe Seylor Road was created by prescription. Seylor Road is maintained by the county, and denoted as a county road on an adjacent landowner's certificate of survey, but it is not included on the county road map.

An Attorney General's Opinion does not resolve questions of fact, and I have not engaged in independent fact-finding. In reaching my conclusions as set forth below, I have accepted your representations for the purposes of this opinion that Seylor Road is a county road created by prescription.

## I.

Prior to determining whether there is access to streams from bridges and abutments, a threshold determination must be made whether access exists from county roads. County roads can be created in a number of ways, including by statutory and common law dedication, by petition, and by prescription. According to your representations, all three roads connecting the bridges at issue are county roads. County Roads 59 and 169 were created by petition, and Seylor Road, according to your analysis, was created by prescription.

These roads incorporating the Seylor, Todd and Water Street bridges are all public highways of the state. Public highways include county roads. Mont. Code Ann. § 60-1-201(c) (1999).

The interest that the public typically acquires in a county road is an easement. In establishing a county road, "the public acquires only the right-of-way and the incidents necessary to enjoying and maintaining it." Mont. Code Ann. § 7-14-2107(3) (1999). Similar language has been part of our statutory framework for over a century. See Rev. Codes Mont. 1947, § 32-107; Mont. Codes Ann., Political Code § 2620 (1895). The holding of an easement, rather than holding the land underneath the public highway in fee, does not limit the public's use of the county road. 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 218, at 744 (1999) ("[A]s to the right of use by the public in the ordinary manner, there is no substantial difference between streets in which title to the fee is in private individuals and those in which it is in the public").

The general rule is that "[t]he public highways belong to the people for use in the ordinary way." Barney v. Board of R.R. Comm'rs, 93 Mont. 115, 129, 17 P.2d 82, 85 (1932); see also Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 516, 110 P. 237, 240 (1910). The Montana Supreme Court has consistently applied "a liberal interpretation of public highway easement uses." United States v. Gates of the Mountains Lakeshore Homes, Inc., 565 F. Supp. 788, 796 (D. Mont. 1983), rev'd on other grounds, 732 F.2d 1411 (9th Cir. 1984). This has been the case for well over a century. Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102, 118, 29 P. 883, 887 (1892), cited in Bolinger v. City of Bozeman, 158 Mont. 507, 519, 493 P.2d 1062, 1067 (1972).

The Court has not only liberally construed the use of the road easement for established uses but has also allowed for the possibility of changing and expanding uses to keep pace with the changes and needs of the public. In Kipp, 41 Mont. at 516-18, 110 P. at 240, the Court explained:

The authorities which control streets and highways may use or permit the use of them in any manner or for any purpose which is *reasonably incident[al]* to the appropriation of them to public travel and to the ordinary uses of streets or highways under the different conditions which arise from time to time . . . [I]t must be borne in mind that the way was created for *all uses to which it might be put in view of improved*

*methods and increasing needs of the public*; and the limitation is to be given a construction which will not defeat this original purpose.

(Emphasis added.)

The broad and expansive interpretation of the uses of public highways continues to the present day. My research has disclosed no Montana decision in which the Court has held that a city or county government allowed uses *exceeding* the grant of the easement creating the public highway.

With regard to using public highways to gain access to streams and rivers, it is unmistakably clear that the waters of our state are owned by the state, and held in trust for its people. Mont. Const. art. IX, § 3(3); Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984); Montana Coalition for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984). For both navigable and non-navigable waters, this constitutional guarantee grants the public the right to use all waters for recreational purposes that are capable of recreational use. Curran, 210 Mont. at 52; 682 P.2d at 171; Hildreth, 211 Mont. at 39, 684 P.2d at 1093.

Landowners holding private property adjacent to Montana's streams and rivers cannot control or interfere with the public's recreational use of the stream. Curran, 210 Mont. at 52, 682 P.2d at 170 ("no private party may bar the use of those waters by the people"); Hildreth, 211 Mont. at 35, 684 P.2d at 1091 ("no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property"). The right of public use not only protects against interference, but also provides a limited easement over the adjacent landowner's property--between the low water mark and the high water mark for navigable rivers and between the center of the streambed and the high water mark for non-navigable streams--to allow the public to use and enjoy these waters. Galt v. State, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987) ("Landowners, through whose property a water course flows as defined in Curran and Hildreth, *supra*, have their fee impressed with a dominant estate in favor of the public.").

Given that the public has a right to use public highways for any manner or for any purpose consistent with or reasonably incidental to public travel, I conclude that this right includes using public rights-of-way created by county roads to gain access to streams and rivers. Using the county road as an access point from one public right-of-way, the road, to another public right-of-way, the stream or river, is consistent with and reasonably incidental to the public's right to travel on county roads.

This conclusion should not serve to upset the expectations of the holders of the servient estates. As explained by the Supreme Court in Bolinger, 158 Mont. at 521, 493 P.2d at 1069 (quoting Wattson v. Eldridge, 278 P. 236, 238 (Cal. 1929)), "[T]he dedicator is presumed to have intended the property to be used in such a way by the public as will be most convenient and comfortable and according to not only the properties and usages known at the time of dedication, but also to those justified by lapse of time and change of conditions." See also 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 223, at 748 (1999) ("The rights of the owner of the underlying fee are always subordinate to the rights of the public and may grow less as the public needs increase.").

This conclusion is also consistent with comments during the 1972 Constitutional Convention that county roads could be used to access Montana's streams and rivers. See V 1972 Mont. Const. Conv. 1304-05 (1981).

Moreover, it is consistent with decisions from other jurisdictions concluding that public roads can be used to access public waters. See Jacobs v. Lyon Township, 502 N.W.2d 382, 384 (Mich. Ct. App. 1993) ("Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide public access to the water."); Heise v. Village of Pewaukee, 285 N.W.2d 859, 864 (Wis. 1979) ("[I]f a public street or highway exists so that its boundary line and the waters of a navigable lake or river meet, the riparian rights incident to the land composing the street belong to the public.").

Finally, this conclusion is also consistent with decisions of other jurisdictions that have found rights of access over publicly impressed lands inherent within the public's right to use these waters. See, e.g.,

State v. Sorensen, 436 N.W.2d 358, 363 (Iowa 1989) ("Fishing and navigation, whether of a commercial or recreational nature, require means of public access to the river. This means that state-owned land adjacent to the river, as well as the land actually covered by the river, must be part of the public trust."); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984) ("To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine."); State v. Town of Linn, 556 N.W.2d 394, 402 (Wis. Ct. App. 1996) ("The general public certainly cannot benefit from the public trust doctrine if it is unable to access the waters.").

## II.

Because the public has access from the county road, they also have access from the bridge and its abutments. A "bridge" includes its abutments, rights-of-way, or other interest in land. Mont. Code Ann. § 7-14-2101(2)(e). Bridges, like county roads, are public highways. Mont. Code Ann. §§ 60-1-103(18), -103(22). The law is settled in Montana that a bridge is but an extension or a part of the highway, road or right-of-way upon which it is built. See State ex rel. Judith Basin County v. Poland, 61 Mont. 600, 604, 203 P. 352, 353 (1921) ("It is conceded, as it must be, that a complete bridge used by the public is part of the public highway."); State ex rel. Furnish v. Mullendore, 53 Mont. 109, 113-15, 161 P. 949, 951-52 (1916) ("a bridge is part and parcel of the highway upon which it is built. . . . If the highways belong to the public, it must follow that anything permanently affixed to them, either in the way of repairs or in the form of completed structures, such as bridges and the like, become a part of them, and as much of public right as the highways themselves."); State ex rel. Foster v. Ritch, 49 Mont. 155, 156-57, 140 P. 731 (1914) ("A bridge is to be treated as but a portion of a public highway.").

The bridge is the intersection of two rights-of-way, and it would be inconsistent with the public's rights of passage on both--the highway and the stream or river--to conclude this intersection does not provide access from one right-of-way to the other. The bridge, as a public highway, offers the same access to streams and rivers for recreational use as does the highway to which it is attached. 39 Am. Jur. 2d. *Highways, Streets, and Bridges* § 217, at 743 (1999) ("Because bridges constitute a part of the highways, they are subject to the same public easement of passage.").

## III.

Several interested parties have argued that the public's right of access may be limited by the terms of an express grant of an easement for a public road. Since none of the three examples you have provided appears to involve such a limited express grant, that issue is not presented by your request. Nothing in this opinion should therefore be read to express a conclusion regarding the right of the public to gain access to a stream from a county road or bridge created pursuant to an express grant of an easement that proscribes recreational access to a stream from the road or bridge.

The conclusions expressed herein are, however, subject to three limitations:

### A.

First, the recreating public must stay within the county road right-of way. Since statehood, the width of county roads has been 60 feet, unless otherwise stated in the petition or dedication creating the road. Mont. Code Ann. § 7-14-2112(1); see also Rev. Codes Mont. 1947, § 32-2808 (1977); § 32-106 (1947).

Although the statute defining the presumptive width of county roads as 60 feet specifically excepts bridges, state law does not distinguish whether the width of bridges is to be greater or less. This may very well be due to the fact that the plain language of Mont. Code Ann. § 7-14-2112(1) defines the *actual width of the road*. It is only through subsequent interpretation that this statute has been applied to set the *actual width of the easement*. For example, if the road does not cover the entire 60 feet, the public still maintains use of the entire 60-foot right of way. Sheldon v. Flathead County, 218 Mont. 270, 272-74, 707 P.2d 540, 542-43 (1985); City of Butte v. Mikosowitz, 39 Mont. 350, 357, 102 P. 593, 595-96 (1909). Moreover, a city cannot abandon the right to the full dedication through non-use or acquiescence in the

use or occupation by private parties. Baertsch v. County of Lewis & Clark, 256 Mont. 114, 122-24, 845 P.2d 106, 111-12 (1992).

Absent statutory or deeded definition of the width of the bridge right-of-way, I conclude that the width of the bridge right-of-way is the same as the public highway to which it is connected. As earlier noted, a bridge is a part of the public highway upon which it is built. Even if the actual width of the bridge is less than the county road, it does not follow that the otherwise undefined right-of-way must also be less.

Moreover, irrespective of the actual width of the bridge, the width of the easement over the waterway susceptible to recreational use is presumably without limit. The constitution guarantees the public the right to use all waters capable of recreational use, thus making any notion of an easement over our streams and rivers nonsensical. As a result, the only right-of-way at issue is the point where the county road right-of-way ends, and the bridge right-of-way begins. It would be illogical to conclude that the bridge somehow extinguishes access that would otherwise exist, if the bridge had not been built. See 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 66, at 628 (1999) ("A public highway leading and extending to navigable waters will keep even pace with the extension of the land, . . . the presumption being that the intent was that the way should reach the water so as to enable the public to enjoy the right of navigation.").

Accordingly, as long as the recreating public stays within the easement created by the county road and bridge, which is assumed to be 60 feet unless otherwise stated in the petition or dedication, the recreationist may traverse from the public highway right-of-way to the high-water mark of the river or stream.

#### B.

Second, access can be limited by the exercise of the governing body's police power to control the use of roads for purposes such as safety and parking. See, e.g., Mont. Code Ann. §§ 61-8-353, 61-12-101. The Board of County Commissioners has the statutory authority to "control, and manage county roads and bridges," Mont. Code Ann. § 7-14-2101(1)(2)(i), to do in their discretion "whatever may be necessary for the best interest of the county roads," Mont. Code Ann. § 7-14-2102, and to exercise general supervision over county roads. Mont. Code Ann. § 7-14-2103.

However, a county commission's powers are not without limitation. They are limited first by the requirement that their actions must be reasonably related to their statutory authority. State ex rel. Bowler v. Board of County Comm'rs, 106 Mont. 251, 257-58, 76 P.2d 648, 652 (1938). For example, a county commission cannot abandon a right-of-way without giving due consideration to the importance of the right-of-way's use to access public lands. See Mont. Code Ann. § 7-14-2615(3) ("The board may not abandon a county road or right-of-way used to access public land unless another public road or right-of-way provides substantially the same access."); see also Lane v. City of Redondo Beach, 122 Cal. Rptr. 189 (Cal. Dist. Ct. App. 1975) ("a municipality's admitted power to vacate a municipal street does not include the power to destroy the right of public access to tidelands or navigable waters.").

#### C.

Finally, the manner in which the public highway was created may limit its usage. Montana law is clear that a road created by prescription is limited--both in size and usage--to the original use during the prescriptive period. In State v. Portmann, 149 Mont. 91, 423 P.2d 56 (1967), the issue was whether a road created by prescriptive easement must be 60 feet in width. The court answered in the negative, holding that the predecessor statute to Mont. Code Ann. § 7-14-2112 "was intended by the Legislature to apply only to public roads which were laid out by the official acts of the proper officials and was never intended to apply to prescriptive easements." Portmann, 149 Mont. at 96, 423 P.2d at 58. The court further held that the "rights acquired by adverse use can never exceed the greatest use made of the land for the full prescriptive period." 149 Mont. at 96, 423 P.2d at 58. The Montana Supreme Court has "never wavered" in restricting usage of prescriptive easements to those uses established during the prescriptive period. Kelly v. Wallace, 1998 MT 307, ¶ 31, 292 Mont. 129, 922 P.2d 1117. Those uses may include access for hunting, fishing, and recreation. Warnack v. Coneen Family Trust, 278 Mont. 80, 86, 923 P.2d 1087, 1091 (1996).

Accordingly, for county roads and bridges established by prescription, their use as access to waters is dependent upon their width and use during the prescriptive period. Whether such restrictions exist with respect to the Seylor Bridge involves factual inquiries beyond the scope of an Attorney General's Opinion.

#### IV.

With the limitations as set forth above, I conclude that access to Montana's waterways is allowed from the public right-of-way created by a county road and bridge. This access is limited inasmuch as the party must stay within the limits of the prescriptive easement or the dedication of the easement, or if no dedication is specified, within the statutory 60-foot easement. Unless there are recorded limitations placed upon the easement, the right-of-way for a bridge on a county road created by express grant extends to the high-water mark of navigable and non-navigable rivers, even if the actual width of the bridge spanning the waterway is less than the easement provided for by the county road.

Applied to the instant matter, and assuming the documents creating the easements contain no express contrary provision, access to the Ruby River exists from the bridge and its abutments for the Water Street and Todd Bridges, and local law enforcement and game wardens should not cite the public for trespass. Concerning the Seylor Road and Bridge, created by prescriptive easement, whether a recreationist could be cited for trespass is a factual determination that cannot be resolved in an Attorney General's Opinion.

THEREFORE, IT IS MY OPINION:

1. Use of a county road right-of-way to gain access to streams and rivers is consistent with and reasonably incidental to the public's right to travel on county roads.
2. A bridge and its abutments are a part of the public highway, and are subject to the same public easement of passage as the highway to which they are attached. Therefore, the public may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments.
3. A member of the public must stay within the road and bridge easement to access streams and rivers. Absent definition in the easement or deed to the contrary, the width of a bridge right-of-way easement is the same as the public highway to which it is attached.
4. Access to streams and rivers from county roads and bridges is subject to the valid exercise of the county commission's police power and its statutory power to manage county roads.
5. Access to streams and rivers from county roads and bridges created by prescription is dependent upon the width and uses of the road during the prescriptive period.

Sincerely,

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Attorney General

jpm/scb/dm