

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2016-025

TO: Mayor John Engen, Dale Bickell, John Wilson, Kevin Slovarp, Mike Haynes, Donna Gaukler, Eric Andersen, Doug Harby, Jane Plummer, Mickey Morin, Jolene Ellerton, Chris Boza, David Selvage, Don Verrue, Marty Rehbein, Brian Hensel, Kathy Mehring, Betsy Willett, Morgan Valiant, Lori Hart

CC: Attorney Department

FROM: Jim Nugent, City Attorney

DATE December 8, 2016

RE: In Montana, by virtue of Montana state law, a Public Utility has a Statutory Right to Use Public Rights of Way for Utility Lines and Facilities, including for underground public utilities

FACTS:

Some city staff continue to inquire concerning the provisions of Montana state law providing that a public utility has a statutory right to use the public right of way to install their public utility facilities.

ISSUE(S):

In Montana, by virtue of Montana state law, do public utilities have a right to use public rights of way for public utility lines and facilities, including underground public utility facilities?

CONCLUSION(S):

Yes. In Montana, pursuant to section 69-4-101 MCA the Montana State Legislature has provided that public utilities have the right to install and maintain their lines and facilities along and upon the public roads, streets and highways in the State of Montana, including underground public utilities.

LEGAL DISCUSSION:

In Montana, by virtue of Montana state law, such as section 69-4-101 MCA, a public utility has a right to install and maintain public utilities, including underground public utilities in public rights of way. Title 69, chapter 4 MCA is entitled UTILITY LINES AND FACILITIES. Section 69-4-101 of part 1 of title 69, chapter 4, MCA provides:

69-4-101. Use of public right-of-way for utility lines and facilities. A telegraph, telephone, electric light, or electric power line corporation or public body or any other person owning or operating such is hereby authorized to install its respective plants and appliances necessary for service and to supply and distribute electricity for lighting, heating, power, and other purposes and to that end, to construct such telegraph, telephone, electric light, or electric power lines, from point to point, along and upon any of the public roads, streets, and highways in the state, by the erection of necessary fixtures, including posts, piers, and abutments necessary for the wires. The same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets, or highways, and nothing herein shall be so construed as to restrict the powers of city or town councils. *(emphasis added)*

Section 69-4-101 MCA pertains to both public utility corporations as well as public bodies, such as municipal local governments and their municipal water and sanitary sewer utility facilities. The statutory authorization applies broadly to public utility "lines", "plants", "appliances", "necessary fixtures, including posts, piers and abutments necessary for wires". Montana state law defines a public utility pursuant to section 69-3-101 MCA as including "any plant or equipment" private or municipal producing, delivering or furnishing heat; light; power in any form; water; sewage service or regulated telecommunications service.

Examples of underground public utility facilities that have been installed in public rights of way in Missoula include, but are not necessarily limited to: natural gas; water; sanitary sewer; telecommunications services.

Dedicated public rights of way, established pursuant to plats or otherwise, generally are land areas intended for public use. The primary recognizable public uses are for highways, streets and alleys as well as for public or municipal utilities, boulevard trees and pedestrian bicycle trails. Sometimes specific language on plats will also specify intended uses for the dedicated land area.

Montana's state highway regulation laws broadly define the terms such as "highway", "Highway, road and street", "public highways" and "right-of-way" related to roads, streets and highways as meaning:

60-1-103(18) "Highway" includes rights-of-way or other interests in land, embankments, retaining walls, culverts, sluices, drainage structures, bridges, railroad-highway crossings, tunnels, signs, guardrails, and protective structures.

60-1-103(19) "Highway", "road", and "street", whether the terms appear together or separately or are preceded by the adjective "public", are general terms denoting a public way for purposes of vehicular travel and include the entire area within the right-of-way.

60-1-103(22) "Public highways" means all streets, roads, highways, bridges, and related structures:

- (a) built and maintained with appropriated funds of the United States or the state or any political subdivision of the state;
- (b) dedicated to public use;
- (c) acquired by eminent domain, as provided in Title 70, chapter 30, and chapter 4 of this title; or
- (d) acquired by adverse use by the public, with jurisdiction having been assumed by the state or any political subdivision of the state.

60-1-103(23) "Right-of-way" is a general term denoting land, property, or any interest in land or property, usually in a strip, acquired for or devoted to highway purposes.

61-1-101(27) "Highway" or "public highway" means the entire width between the boundary lines of every publicly maintained way when any part of the publicly maintained way is open to the use of the public for purposes of vehicular travel.

61-1-101(77) "Street" means the entire width between the boundary lines of every publicly maintained way when any part of the publicly maintained way is open to the use of the public for purposes of vehicular travel.

61-8-102(2)(i) that part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway; or

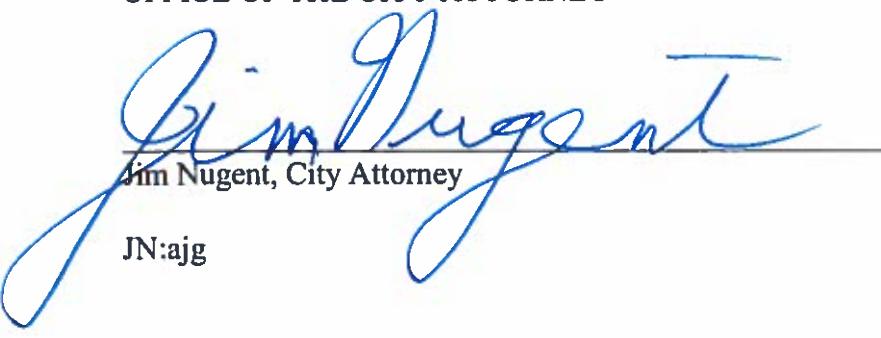
In 1977, United States District Court Judge Russell Smith, Montana, Missoula division, stated that in Montana by virtue of Montana state law a public utility, such as a telephone company, has a right to both bury as well as maintain its buried cable within the public right of way. See *U.S. v. Mtn. States Tel. & Tel. co.* 434 F. Supp. 625 (District of Montana 1977).

City of Missoula staffs such as public works, city engineer, city parks and development services must work reasonably together within city operations to present a consistent city plan or policy for managing and administering public rights of way in a manner that recognizes that, by virtue of Montana state law and court decisions, public utilities have a statutory right to use public rights of way for installation of public utility facilities.

CONCLUSION(S):

Yes. In Montana, pursuant to section 69-4-101 MCA the Montana State Legislature has provided that public utilities have the right to install and maintain their lines and facilities along and upon the public roads, streets and highways in the State of Montana, including underground utilities.

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Jim Nugent, City Attorney

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