

47 Op. Att'y Gen. No. 10

LAND USE - Application of Subdivision and Platting Act to parcels created by United States Government Survey;
PUBLIC LANDS - Survey by United States Government and application of Subdivision and Platting Act;
SUBDIVISION AND PLATTING ACT - Parcels created by United States Government Survey;
SURVEYORS - Application of Subdivision and Platting Act to parcels created by United States Government Survey;
MONTANA CODE ANNOTATED - Sections 76-3-102, 76-3-103(3), (15), 76-3-206, 76-3-609(1);
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. 36 (1987), 42 Op. Att'y Gen. 16 (1987), 41 Op. Att'y Gen. 40 (1986), 40 Op. Att'y Gen. 57 (1984), 38 Op. Att'y Gen. 106 (1980), 38 Op. Att'y Gen. 66 (1980), 35 Op. Att'y Gen. 55 (1973);
UNITED STATES CODE - Title 43, section 753.

HELD:

Parcels of land are not exempt from the requirements of the Subdivision and Platting Act solely by virtue of the fact that they are described by reference to boundaries established by a United States Government Survey.

December 30, 1997

Mr. Bob Slomski
Sanders County Attorney
P.O. Box 519
Thompson Falls, MT 59873

Dear Mr. Slomski:

You have requested my opinion on a question which I have framed as follows:

Are parcels of land exempt from the requirements of the Subdivision and Platting Act solely by virtue of the fact that they are described by reference to boundaries established by a United States Government Survey?

Resolution of this question requires an understanding of United States Government Survey Maps and their relevance to state statutes regulating divisions of land.

United States Government Survey Maps (U.S. Survey Maps) evolved during the establishment of the United States in the late eighteenth century and its westward expansion during the nineteenth century. The first public land surveys were made under an ordinance passed by the Continental Congress in 1775. The Land Ordinance of 1785 adopted the rectangular grid system of surveying which provided a means of dividing the public domain into an orderly arrangement of square mile sections and placing monuments upon the ground to locate and fix land divisions for all time. See Pointner v. Johnson, 695 P.2d 399, 401 (Idaho 1985). Eight subsequent clarifying acts were passed by Congress, and a Manual of Surveying Instructions for the Surveying of the Public Lands of the United States and the Federal Government was published and updated on a regular basis.

The federal law and surveying manual provided a common method of property description which facilitated settlement of the West and disposition of the public domain. George Cameron Coggins and Charles F. Wilkinson, Federal Public Land and Resource Law 43 (1981). Public lands were surveyed by the General Land Office which prepared a U.S. Survey Map. The U.S. Survey Map was recorded at the office of the United States Surveyor General. The surveyed lands could then be disposed through a federal patent that simply identified the particular section, quarter section or government lot to be conveyed with reference to the U.S. Survey Map. See Chapman v. Polack, 11 P. 764 (Cal. 1886).

The federal survey system resulted in the establishment of townships composed of 36 sections each. A standard section comprises a square mile of land, or 640 acres, and consists of aliquot parts of sections (half section, quarter section, quarter-quarter section) originally established by the U.S. Survey Map.

In addition to these regular fractions of government sections, thousands of "government lots" exist in Montana. "Government lots" are rectangular or irregularly shaped parcels which were surveyed or projected in the course of laying out the rectangular grid system which is the framework of the government survey system. Due to the curvature of the earth, a township of land commonly includes some sections which comprise slightly more or less than the traditional 640 acres. According to the survey system, these irregular sections are found along the west and north borders of the township.

Rather than comprising 640 acres divided into four quarter sections of equal size, these irregular sections might, for example, comprise only 630 acres, more or less, divided into two full quarter sections of 160 acres each, two half quarter sections of 80 acres each, and four smaller rectangular "government lots" of somewhat less than 40 acres each. Other "government lots" are irregular in size and shape and resulted from the presence of irregularly shaped bodies of water or other features that prevented the surveying of an entire section into regularly sized and shaped aliquot parts. Your question essentially asks whether a property owner may convey these component aliquot parts of sections and government lots, described and identified in a deed on file with the county clerk and recorder and less than 160 acres in size (see Mont. Code Ann. §76-3-103(15) (1997)), without complying with the requirements of the Subdivision and Platting Act.

The Subdivision and Platting Act's review requirements only apply to the conveyance of parcels that were created after the effective date of the Act, July 1, 1973. 35 Op. Att'y Gen. 55 (1973); see Mont. Code Ann. §76-3-206. The argument has been advanced that the work of the Government Land Office in the late nineteenth century preparing the U.S. Survey Maps "subdivided" the public domain land, that government lots and aliquot parcels were created and described in deeds that predated the Subdivision and Platting Act and, thus, that the Act cannot be applied to their subsequent conveyance. It is suggested that any interpretation of the Subdivision and Platting Act that would require review of these federal "subdivisions" would void the federal law under which the U.S. Survey Maps were prepared.

From the perspective of surveying, as well as in common parlance, it may be said that the U.S. Survey Maps "subdivided" the public domain. Federal statutes dealing with the creation and application of the federal survey system refer to aliquot parts of sections as having been "subdivided." See, e.g., 43 U.S.C. §753 ("fractional sections containing one hundred and sixty acres or upwards shall in like manner as nearly as practicable be subdivided"). However, the proper focus of my analysis is not whether in some sense the federal survey system accomplished what in another context might be called a "subdivision," but rather whether the process of surveying these lands accomplished a "division of land" for purposes of the Montana Subdivision and Platting Act.

I note initially that the objectives of the federal survey laws and those of the Montana Subdivision and Platting Act are distinct. Federal survey laws were adopted to facilitate the conveyance of lands in the public domain into private ownership. See generally 4 Robert M. Anderson, American Law of Zoning §25.01, at 263-64 (3d ed. 1986). The purpose of the Subdivision and Platting Act, in contrast, is generally to regulate divisions of land and conveyances of property among private landowners. It does not generally regulate conveyance of federal lands, see 42 Op. Att'y Gen. 36 at 149 (1987), and therefore does not conflict directly with the purpose of the federal land survey system.

Moreover, compliance with the federal survey laws does not accomplish all the purposes of the Subdivision and Platting Act. Mont. Code Ann. §76-3-102 sets forth the purposes of the Act as follows:

It is the purpose of this chapter to:

- (1) promote the public health, safety, and general welfare by regulating the subdivision of land;
- (2) prevent overcrowding of land;

(3) lessen congestion in the streets and highways;

(4) provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements;

(5) require development in harmony with the natural environment;

(6) protect the rights of property owners; and

(7) require uniform monumentation of land subdivisions and transferring interests in real property by reference to a plat or certificate of survey.

See 38 Op. Att'y Gen. 106 at 369-70 (1980). While some of these purposes, particularly in the monumentation and transfer clause found in subsection (7), are consistent with those supporting the federal survey laws, the overarching objectives of the state statutes to provide safeguards against social and environmental effects of unregulated land development, see 42 Op. Att'y Gen. 16 at 60 (1987) are not advanced by compliance with the federal law. The Subdivision and Platting Act achieves these goals through ensuring the proper arrangement of streets, installation of utilities, access for fire and emergency equipment, and other worthy objectives which are not advanced by the federal land survey laws.

Regulated subdivision activity occurs under Montana's Act when there has been a "division of land." This keystone phrase is defined as follows:

"Division of land" means the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter. The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land.

Mont. Code Ann. §76-3-103(3) (1997). The last sentence of this definition was added by an amendment in 1997 and will be discussed below.

Under the Act, a "division of land" consists of "segregation of one or more parcels from a larger tract held in single or undivided ownership," and occurs in one of two ways: (1) by conveying or contracting to convey ownership or possession of a portion of the tract, or (2) by the proper filing of a plat or certificate of survey "establishing the identity of the segregated parcels pursuant to [the Act]." Mont. Code Ann. §76_3-103(3). The establishing of boundaries for a tract of land through the federal survey system does neither. That is, the acts of surveying a section of land, monumenting the results of the survey on the ground, and depicting the results of the survey on a federal survey map do not convey or contract to convey ownership or possession of the tract. Neither do they constitute "properly filing a certificate of survey or subdivision plat ... pursuant to" the Subdivision and Platting Act. Cf. John Taft Corp. v. Advisory Agency, 207 Cal. Rptr. 840 (Cal. Ct. App. 1984) (surveying of parcels under federal survey laws did not create a "subdivision" under California subdivision laws).

In 38 Op. Att'y Gen. 66 (1980), Attorney General Greely concluded that the "division of land" definition includes the segregation of an aliquot part of a government section from a larger tract, even though the parcel to be segregated is separately described in an underlying deed. "The crucial factor is single or undivided ownership of a larger tract, not the description in the deed by which the owner obtained the tract." 39 Op. Att'y Gen. 66 at 231. Under this opinion the "division of land" definition applies to any segregation of a parcel of fewer than 160 acres "from a larger tract" unless otherwise exempted from the Act's provisions. It has been suggested that legislative amendments adopted since 1980 have undermined the authority of this opinion, and I now turn to that question.

Prior to 1993, the term "tract of record" appeared only in one section of the Act dealing with minor subdivisions. See Mont. Code Ann. §76-3-609(1) (1991). In 1993, for reasons that do not clearly appear from either the statute or its legislative history, the legislature adopted a statutory definition of the term "tract of record," defining it as follows: "'Tract of record' means a parcel of land, irrespective of ownership,

that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder." 1993 Mont. Laws, ch. 272, §2. In 1997, the legislature further amended this definition, inserting the word "individual" to modify "parcel of land" where the term first appears in the definition and adding two new subsections dealing with the process for taking affirmative action to aggregate individual parcels into a single tract of record. 1997 Mont. Laws, ch.503, §1. The same bill also added the following language to the definition of "division of land" in Mont. Code Ann. §76-3-103(3), quoted above: "The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land." Id., codified at §76-3-103(16). This sentence clarified the effect of the statute by stating that an individual parcel remaining after a prior "division of land" could be conveyed without accomplishing a second "division of land."

It is argued that the effect of the addition of a definition of "tract of record" and the provision that conveyance of a "tract of record" is not a "division of land" effectively overrules 38 Op. Att'y Gen. 66 (1980), at least with respect to property which is described in a deed on file with the county clerk and recorder by reference to aliquot parts of a government section or government lots depicted on survey maps. This assertion is advanced in reliance on the observation that reference to such aliquot parts or lots in a deed would allow identification of each aliquot part "by legal description, independent of any other parcel of land."

However, this argument overlooks the fact that in order to qualify as a "tract of record" the parcel must first be an "individual parcel of land." If, for example, a deed conveys adjoining quarter-sections found in different sections, it has been assumed for purposes of the Act that a single "parcel" is conveyed, albeit described by reference to two aliquot parts of different government sections. That is the effect of 38 Op. Att'y Gen. 66 (1980). Neither aliquot part constitutes an "individual parcel" although either could be separately identified by reference to the deed. Rather, the earlier conveyance transferred a single parcel described by reference to two aliquot parts of two government survey sections. Nothing in the 1997 amendments to the Act undermines this assumption, and there is no indication in the legislative history of the amendments that it was the intention of the legislature to do so.

To the contrary, during the same legislative session that adopted the 1997 amendments a separate bill was proposed, House Bill 450, that would have had the effect of exempting conveyance of these parcels from subdivision review. As proposed, the bill would have specifically included in the definition of "tract of record" the following:

[A] parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office or federal repository and includes a quarter quarter section or government lot created by an approved survey conducted under federal law.

(Emphasis added.) The underscored language would have specified that an aliquot portion (or at least one that could be described as a "quarter quarter section") or government lot was a "tract of record." House Bill 450 was tabled in committee, suggesting that its objective was not within the legislature's intent. See Montana Contractors' Ass'n, Inc. v. Department of Highways, 220 Mont. 392, 396, 715 P.2d 1056, 1059 (1986) (legislative rejection of proposed bill supports inference that object of rejected legislation was not within legislative intent).

In my opinion, a government lot or an aliquot part of a government survey section is not a "tract of record" simply by virtue of the fact that its description appears in a deed on file with the clerk and recorder, unless it satisfies the requirement that it be an "individual parcel of land," either through its having been segregated and conveyed individually prior to the effective date of the Act or through segregation or conveyance in compliance with the Act. A government lot or an aliquot part that is aggregated with other contiguous lots or aliquot parts in an earlier conveyance is not an "individual parcel" and cannot later be segregated from the other lots or aliquot parts without compliance with the Act unless otherwise exempted from review.

I note that neither Montana statute nor case law has specifically recognized parcels created by U.S. Survey Maps as existing "divisions of land" for purposes of the Subdivision and Platting Act. The Act in

particular is silent on this point. In the absence of statutory language addressing government surveys, it is difficult to construe such an exemption by implication, and I do not do so here.

The U.S. Survey Map is a method of property description and survey. Government lots and survey sections were created by federal map to facilitate their disposition, not to ensure orderly growth of future communities. As I have indicated, the goals of federal surveying statutes and state subdivision law are distinct; compliance with the federal law does not supplant the need for state review. Similarly, recognition of state subdivision review authority does not conflict with federal law. Boundaries and monuments established by the U.S. Survey Map are given their full legal effect regardless of subsequent state review of property division and conveyance.

Finally, I note that the Subdivision and Platting Act is legislation enacted for the promotion of public health, safety and general welfare. Mont. Code Ann. §76-3-102(1). As such, it is entitled to liberal construction with a view toward the accomplishment of its highly beneficent objectives. Exemptions should be given a narrow interpretation. State ex rel. Dreher v. Fuller, 257 Mont. 445, 448-49, 849 P.2d 1045, 1047 (1993); State ex rel. Florence-Carlton Sch. Dist. v. Board of County Comm'rs, 180 Mont. 285, 291, 590 P.2d 602, 606 (1978); see 41 Op. Att'y Gen. 40 at 157-58 (1986); 40 Op. Att'y Gen. 57 at 233-34 (1984). This rule of law is more than a mere form of words. It has specific legal effect in construing doubtful language in the Act, and counsels against resolving ambiguities in the Act in favor of creating a broad new exemption to its coverage. A holding that parcels of land identified in filed deeds by reference to aliquot portions of government survey sections or government lots could on that basis alone be conveyed without compliance with the Act would have the effect of exempting conveyance of hundreds, if not thousands, of parcels of land in Montana from subdivision review under the Act. As the above discussion shows, there is no clear indication in the Act that the legislature intended such a dramatic change in the law in framing the language that now exists in the statutes.

THEREFORE, IT IS MY OPINION:

Parcels of land are not exempt from the requirements of the Subdivision and Platting Act solely by virtue of the fact that they are described by reference to boundaries established by a United States Government Survey.

Sincerely,

JOSEPH P. MAZUREK
Attorney General