

May 25, 2006

Mr. Blaine Bradshaw  
Granite County Attorney  
P.O. Box 489  
Philipsburg, MT 59858-0489

Dear Mr. Bradshaw:

You have requested an opinion from the Attorney General with respect to whether the application of the survey requirements of the Subdivision and Platting Act, Mont. Code Ann. § 76-3-401, apply to the sale of a 170-acre parcel of property segregated from a larger tract in 1946 by the granting of a federal highway right-of-way. Since your question is answered by reference to clear statutory authority, it has been determined that a letter of advice rather than a formal opinion is appropriate in this instance.

Montana Code Annotated § 76-3-401 contains the requirements for survey of a division of land lands that is not subdivision. It provides:

**Survey requirements for lands other than subdivisions.** All divisions of land for sale other than a subdivision after July 1, 1974, into parcels which cannot be described as 1/32 or larger aliquot parts of a United States government section or a United States government lot must be surveyed by or under the supervision of a registered land surveyor. Surveys required under this section must comply with the requirements of 76-3-406.

The creation of the 170-acre parcel predated the enactment of the Act and does not fit the definition of “subdivision” because, among other things, the parcel exceeds 160 acres in size. This section therefore provides the pertinent surveying rules.

In my opinion at least two provisions of the Subdivision and Platting Act can be applied to exempt sale of the parcel from the surveying requirement. First, the survey requirements apply only to a “division of land.” The sale of the remainder in 2006 is not a “division of land” under the Act. The definition of “division of land,” Mont. Code Ann. § 76-3-103(4), provides:

Mr. Blaine Bradshaw  
May 25, 2006  
Page 2

“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.***

(Emphasis added.) The “transferring or contracting to transfer title to or possession of” the 170-acre parcel occurred by the granting of the easement in 1946. Its conveyance in 2006 will not be a new “division of land” because under the facts as you have explained them this would be a “conveyance of . . . an entire parcel of land that was created by a previous division of land.” 44 Op. Att’y Gen. No. 25 (1992) (survey not required for conveyance of entire parcel previously created by grant of state highway right-of-way); 42 Op. Att’y Gen. No. 121 (1988) (survey not required for conveyance of tract containing two smaller tracts previously surveyed); 37 Op. Att’y Gen. No. 88 (1977) (survey not required for conveyance of tract created prior to effective date of Subdivision and Platting Act).

Second, the “division of land” that created the 170-acre parcel occurred in 1946, before the effective date of the Act. The survey requirements in Mont. Code Ann. § 76-3-401 apply only to “divisions of land for sale . . . after July 1, 1974.” Id.

These provisions most directly exclude the sale of the 170-acre parcel from the survey requirements. I also agree with your analysis that the effect of 44 Op. Att’y Gen. No. 25 (1992) is not limited to the creation of state highways. That opinion held that any sale of a remainder parcel created by the grant of a state highway right-of-way would not require survey because “the division occurred when the state took the land for highway purposes. . . . Any subsequent transfer or sale of the entire remainder would not involve a division of land and thus there would be no requirement for survey. . . .” Nothing in this analysis is dependent on whether the creation of the remainder resulted from granting a right-of-way for a state highway rather than a federal one.

This letter of advice may not be considered a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN  
Chief Civil Counsel

cdt/jym