



MEMORANDUM

TO: Steve Niday, Public Works, County Surveyor Division
FROM: D. James McCubbin, Deputy County Attorney
DATE: December 13, 2012

RE: Mullan Road right-of-way width

I am writing in response to your request for an opinion regarding the width of the Mullan Road right-of-way. I understand that your enquiry arises from your receipt of information during a presentation on Public Road Law by attorney Peter Dayton, and that the question is now pressing because you are currently reviewing a draft survey retracing a portion of Mullan Road.

Mullan Road was declared to be a public route on January 7, 1869 by the Territorial Legislature. The "Act to declare the Military or Mullen road a Public Highway," at 1869 Mont. Laws 102, provided in full:

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TERRITORY OF MONTANA.

AN ACT to declare the Military or Mullen road a Public Highway.

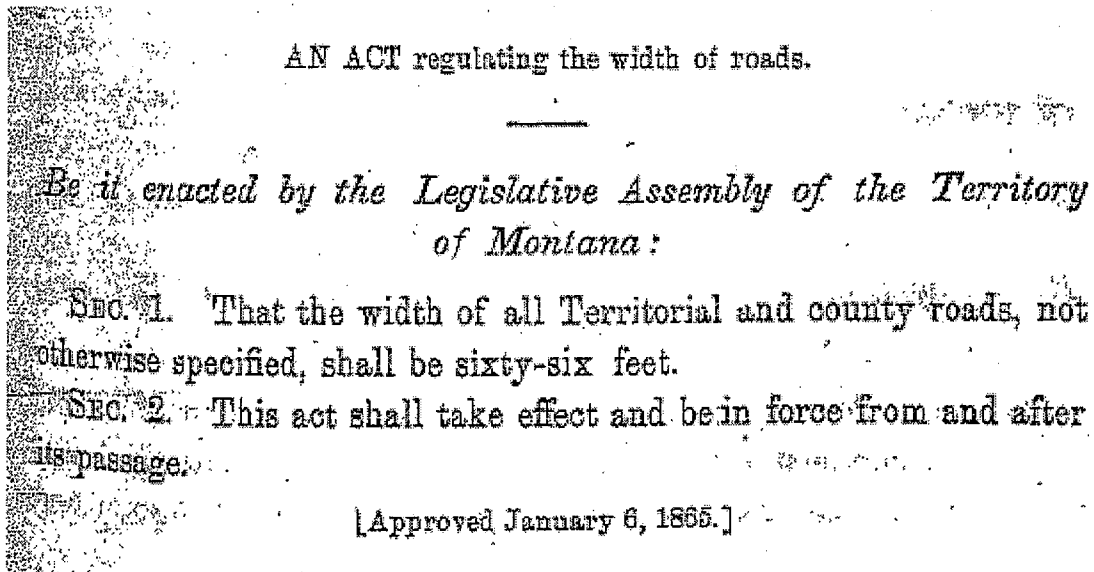
Be it enacted by the Legislative Assembly of the Territory of Montana :

SECTION 1. All that portion of the military road known as the Mullen road from Fort Benton to the summit of the Ocaur d'Alene mountains, be and the same is hereby declared a public highway ; and any person or persons collecting toll on the said Mullen road shall be deemed guilty of a misdemeanor, and on conviction before any court of competent jurisdiction, shall be fined in any sum not less than twenty-five nor more than one hundred dollars, and be adjudged to pay all costs of prosecution.

SEC. 2. This act to take effect and be in force from and after its passage.

Approved January 7, 1869.

In order to determine the width of Mullan Road, we must look to the law in effect at the time that it was first established as a public right-of-way. *See, e.g., Karlson v. Rosich*, 334 Mont. 370, 147 P.3d 196, ¶14-15 (Mont. 2006). The law controlling the width of public roads that was in effect in 1869, when the Mullan Road was established as a public road, was the “Act regulating the width of roads” enacted in 1865. This Act, found at 1865 Mont. Laws 347, provided in full:



The Territorial Legislature reaffirmed the width of roads as 66 feet in 1872, providing “That the width of all territorial and county roads, not otherwise specified, shall be sixty-six feet.” General and Miscellaneous Laws, Chapter LIII, Roads and Highways, Section 4, 1872 Mont. Laws 541.*

Thus, based upon the laws in effect at the time that the Mullan Road was declared to be a public road, the width of the Mullan Road public right-of-way is sixty-six (66) feet.

I am aware that various surveyors, members of the public, and attorneys have, over time, assumed that the width of Mullan Road is sixty feet. However, regardless of inconsistent surveys, the legal width of the right-of-way for Mullan road remains 66 feet unless and until the right-of-way is partially or entirely altered or abandoned through a formal petition and hearing process in accordance with law. M.C.A. § 7-14-2615 (“All county roads once established must continue to be county roads until abandoned or vacated. . . .”); *Baertsch v. County of Lewis and Clark*, 256 Mont. 114, 845 P.2d 106, 110-111 (Mont. 1992) (mere non-use will not cause

* The Territorial Legislature subsequently amended the law for width of roads in 1873 to provide that county roads shall be “in width not less than sixty feet or more than eighty feet.” An Act to define and provide for the working of Public Roads and Highways, Section 7, 1873 Mont. Laws 117 (1873 Extraordinary Session, published in 1874). The default width of public roads in Montana has been maintained at 60 feet ever since, through various iterations of the law. *See, e.g., M.C.A. §7-14-2112* (2011), “Width of roads.”

roadway to cease to exist as a public roadway); *see also Only A Mile, LLP v. State*, 356 Mont. 213; 233 P.3d 320 (Mont. 2010) (“The road is overgrown and no longer in general use; however, it is undisputed that it was never formally abandoned and therefore ‘remains’ a county road with a 60-foot right-of-way in the location of its original placement.”); *Sheldon v. Flathead County*, 218 Mont. 270; 707 P.2d 540 (Mont. 1985) (affirming that road found to have been petitioned in 1902 remains a public 60-foot road notwithstanding 25-foot constructed width); and M.C.A. §60-4-208 (state highways continue to exist until abandoned or vacated).

In the future, any surveys of Mullan Road should depict the width of the public right-of-way as sixty-six feet, unless there has been a prior formal partial abandonment or alteration of the right-of-way in accordance with law. It is possible that where the right-of-way has been incorrectly assumed to be narrower, there may now be encroachments of fences or other improvements in the sixty-six foot wide right-of-way. In many cases, it may be possible to issue temporary encroachment permits to address these situations if there is no interference with the safe passage of traffic on Mullan Road. Partial abandonments may also be a possibility, but would only be appropriate to the extent the County Commissioners can make a fact-based determination that the full width of the right-of-way will not be needed for future improvements to the road.

Finally, please note that this Memorandum is limited in scope to a general discussion of Mullan road in its entirety, based upon its location as established January 7, 1869. It is possible that portions of Mullan Road may have already been partially or entirely altered or abandoned, and any such action may have affected the width of those particular sections of the road.

DJM

