

## Opinion No. 56-6493

July 11, 1956

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. L. D. Wilson, Chief Highway Engineer, Highway Department Building, Santa Fe, New Mexico

You have asked our opinion as to the status of the right of way for two bridges to be built across Eagle Creek on State Roads 83 and 13. It is our understanding that for many years both locations have been used as public roads and that old bridges existed where the new bridges are to be placed, and that there is no easement of record to any public body for these locations.

Your title search indicates that one of these bridges is to be located on public land not devoted to any other public use, but that the other bridge may be located within a quarter section for which patent was issued by the government in 1921. You assure us, however, that prior to that date the old road and old bridge were in existence.

43 USCS 932 passed by Congress July 26, 1866 provides:

"The right of way for the construction of highways over public lands, not reserved for public use is hereby granted."

Our courts, as well as many others have held that this is an offer to dedicate any unreserved public lands for the construction of highways, **to become effective when accepted**. A.T.&S.F.R. Co. v. Richter 20 NM 278, Lovelace v. Hightower 50 NM 50. The court in the latter case said:

"It is a general rule that acceptance of an offered dedication of land for a highway may be established by proof of affirmative acts of taking possession by public authorities or by general use by the public, provided the use is sufficient to constitute acceptance. Wilson v. Williams 43 NM 173, and others."

No doubt the use of the road for one year, or any evidence of its construction or maintenance by the state or county would be sufficient. Just how wide a right of way is thus acquired either side of that portion used and maintained is a more difficult question. See Attorney General Opinion No. 5624, pp. 13 to 17, given the Highway Department on December 31, 1952.

It would appear therefore that the rights of way for both bridges were accepted by affirmative acts of taking possession by some public authority or by general public use while the lands were still public domain, and that this situation still exists with reference to the first bridge, and as to it, there could be no question but that you have an adequate right of way.

As to the second bridge, which is located within the boundaries of a tract patented to another; since the old road and old bridge were there first, prior to the patent, the patentees' title and rights received by virtue of the patent were subject to the rights of the state and of the general public for the use of this site for the purpose you propose. Lovelace v. Hightower, supra.