

## Opinion No. 59-82

July 28, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

**TO:** Hon. R. C. Morgan State Senator 223 South Main Portales, New Mexico

{\*140} This is a reply to your recent request for an opinion on:

"Can the County Commissioners of a county where a highway is being constructed as a secondary federal aid road, claim payment for rights-of-way from the Chief Highway Engineer if a bill has been submitted to the county commission for easement?"

It is my opinion that the County Commissioners cannot claim payments for rights-of-way from the State Highway Engineer on secondary roads.

The section to which you state you are referring is Chapter 243, Laws of 1957, (§ 55-2-28, N.M.S.A., 1953 Compilation, p.s.). This section of the New Mexico statutes may be broken down into four parts:

"The rights-of-way deemed necessary by the state highway commission for highways constructed under supervision of said commission shall be acquired by the county by donation by the owners of the lands through which such highways shall pass, or by agreement between such owners and the board of county commissioners of the county, or through the exercise of the power of eminent domain in the manner provided by law for acquiring property for public use."

This portion of the statute directs the county to acquire rights-of-way and does not authorize or direct payment for such rights-of-way. It refers to all "highways constructed under the supervision of said commission". If the statute went no further, there would be no authority for the chief highway engineer to reimburse the county for costs of acquisition of rights-of-way over any highways. This portion of the statute has remained unchanged since its passage in 1917 Laws 1917) Chapter 38, Section 12). An Attorney General's Opinion was rendered on the interpretation of this portion of the statute on October 25, 1919. This opinion states that it is "incumbent upon the county to acquire rights-of-way for highways and to defray whatever expense results from this action."

The present statute has been amended and now goes further. It provides for reimbursement to the county for costs incurred by the county in certain instances. It provides for payment out of the state road fund either directly to the owner of the property, or, reimbursement to the county, if the county has agreed upon a cost with the State Highway Engineer or if the cost of the subject property has been fixed by condemnation proceedings or judgment in a damage suit, in the case of federal aid **interstate** roads. This portion reads as follows:

"In the acquisition of rights-of-way for federal aid interstate routes the chief highway engineer may acquire the same by voucher to the owner drawn upon the state road fund, or may reimburse the county therefrom at a cost agreed upon by the chief highway engineer, or fixed by the court in any condemnation or suit for damages."

The third portion of the statutes {*\*141*} deals with highways other than federal aid interstate systems, but is limited to those other highways which comprise the **primary highway system**. The chief highway engineer is authorized and directed to pay directly to the owners by voucher drawn against the state road fund in an amount agreed upon in advance by the chief highway engineer and board of county commissioners or in such sum as may be determined by an appraisal conducted in accord with § 55-2-21.1, N.M.S.A., 1953 Compilation, p.s.

The fourth portion of the statute deals with the acquisition of rights-of-way for any highways pursuant to cooperative agreements. Such cooperative agreements are authorized by § 55-2-20, N.M.S.A., 1953 Compilation, p.s. For the purpose of "the acquisition of rights-of-way therefor, or for materials for the construction or improvement thereof." The agreements between the State Highway Commission and municipalities, counties and other adjoining states are for the purpose of determining what share of the expense of such construction or improvements shall be borne by each. Such agreements could conceivably include secondary roads and, in the event such an agreement were made with a county by the state highway commission, the chief engineer could issue his voucher for payment thereof. It must be noted, however, that even with such an agreement, the payment is not out of the state road fund as such, but is to be charged against the "moneys in the state road funds furnished by said county for the construction and right-of-way of said highway".

Absent such an agreement, the only authority created by Chapter 23, Laws of 1957, by which the county commissioners can claim payment from the chief highway engineer for costs of right-of-way is in the construction of **primary systems** and federal aid **interstate** roads.

There is no authority under Chapter 243, Laws of 1957, by which the county commissioners can claim payment from the chief highway engineer for right-of-way in the construction of a secondary road.

I am enclosing Opinion No. 2413 which may be of benefit to you.

By: B. J. Baggett

Assistant Attorney General