

Opinion No. 14-1164

March 6, 1914

BY: H. S. CLANCY, Assistant Attorney General

TO: Mrs. Nancy King, P. O. Box No. 213, Estancia, New Mexico.

ROADS.

Right of county commissioners; may declare township and section lines public highways.

OPINION

{*20} Your letter of February 10, addressed to the Governor of New Mexico, has just been referred to this office for reply.

My letter of January 27, 1914, addressed to Mr. Frank Browning of Moriarity, a printed copy of which you enclose, requires some correction insofar as it refers to obtaining the consent of the Federal government to declare all township and section lines public highways. Since the writing of that letter, the attention of the Attorney General and myself has been called to section 2477 of the statutes of the United States, which provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

In a letter dated February 20, 1913, addressed to the State Engineer, the Attorney General made use of the following language:

"The only statute in New Mexico on this subject is to be found in the proviso in Section 1829 of the Compiled Laws of 1897, which provides, 'That when practicable the county commissioners shall declare all township and section lines, public highways of not less than forty feet in width, and where there is no improvement, no compensation shall be paid for such highways.' This is modified by Section 18 of Chapter 124 of the laws of 1905, which provides that all public highways shall be sixty feet in width, unless otherwise ordered by the board of county commissioners. Under this statute, it was within the power of the county commissioners to declare township and section lines public highways without any preliminary of petition, appointment of viewers, etc., but it is quite clear that the legislature would have no power to provide for taking private property without compensation. This would have been in violation of the Constitution of the United States which, in its 5th amendment, declares that private property shall not be taken for public use without just compensation, and would now {*21} be in violation of our State Constitution of which Section 20 of Article II says 'Private property shall not be taken or damaged for public use without just compensation.'"

"The second matter is as to the validity of the action of the county commissioners in Luna County when they declared all section and township lines public roads, in accordance with the authority contained in said Section 1829. What I have already said would certainly indicate doubt as to the validity of such order, if it is to be carried to the extent of taking property without any further proceedings and without any compensation to the owners of the land taken. It would probably not be necessary to make any further order establishing such a road, but in order to get the land, if it is held in private ownership, it would be necessary to proceed to have it condemned and the compensation fixed and paid in the manner provided for in Chapter 97 of the laws of 1905. By Section 15 of that act, its provisions are extended to the condemnation of land for roads, as well as other purposes. The board of county commissioners, or the county road board, could cause proceedings to be instituted in the District Court for the condemnation of the land."

"The third matter is as to the right of the county commissioners to open up a road along a township line 'without any viewing and condemnation.' I think this is, substantially, answered by what I have already written and that, as no private property can be taken without compensation, and, as the method of ascertaining that compensation is provided for in said Chapter 97 of the laws of 1905, it will be necessary to proceed in accordance with that chapter to condemn the land."

I believe that the foregoing covers everything that this office can say in regard to the establishment of public highways on township and section lines.