

Opinion No. 14-1191

April 15, 1914

BY: FRANK W. CLANCY, Attorney General

TO: James A. French, State Engineer, Santa Fe, New Mexico.

ROADS.

State Engineer or State Highway Commission has no power to override action of county authorities in determining upon construction of a road.

OPINION

{*47} I have before me your letter of the 13th inst., enclosing correspondence between Mr. Neill B. Field and your office, in regard to the location of roads in Valencia County, and you say that Mr. Field takes the position that the State Engineer has authority to prevent the county road board from building the road protested against by Mr. Castillo, while you believe that you have no authority to interfere in the construction or location of that road, and you present for consideration the question as to whether you, as a member of the State Highway Commission, have authority, or whether the State Highway Commission has authority, to prevent the county road board from building and constructing a road which has been properly [Illegible Word] and condemned by the county commissioners.

It is quite clear from an examination of the statutes that neither you, as State Engineer, nor as a member of the State Highway Commission, nor the Commission itself has full power and complete control of roads throughout the state. The Commission was created by Chapter 42 of the Laws of 1909, and by that act is given "general charge {*48} and supervision of all highways and bridges in the Territory which are constructed or maintained, in whole or in part, by the aid of territorial moneys as hereinafter provided." It is also made "the duty of such Commission to construct, repair and maintain, at the expense of the Territory, either wholly or in part, such public roads and highways, within the Territory, as in their judgment will best subserve the interest of the general public, looking to the construction and maintenance of a complete system of highways in the Territory." The above quoted language is from Sections 3 and 4 of the act.

In Section 6 is the only language which would seem to give the Commission any such power as you say Mr. Field contends that it has, and that section is as follows, omitting a proviso which is not material to the present discussion:

"Sec. 6. It shall be the duty of the said commission to investigate the need of various localities in the Territory in regard to public roads and to determine what roads shall be constructed or repaired, and to co-operate with the various boards of county

commissioners of the different counties of the Territory in the construction of such roads and highways: * * *"

Were there no other legislation on this subject, this language in Section 6 would be broad enough to take away from the then existing local county officers, county commissioners and road supervisors, all power to determine whether roads should be constructed or not, but at that time we had in existence elaborate legislation, which is to be found in Chapter 124 of the laws of 1905, as to the establishment, alteration and construction of roads which gave to the boards of county commissioners full control over the subject and vested them with a large discretion and I am unable to find in the act of 1909 anything to indicate that the legislature intended to take away this power from the county commissioners or to impair or change it in any way. There is nothing to show that the county commissioners in this matter are to be subordinates of the central highway commission.

Even if there were room for difference of opinion as to the effect of the act of 1909, it would be removed by a consideration of Chapter 54 of the laws of 1912, which created the county road boards. That act also legislates as to the duties and powers of the State Highway Commission, but says nothing upon the subject of any establishment of roads by the Commission. It is provided that the Commission shall have charge of the expenditure of the state road fund; shall make rules and regulations governing the method of construction, improvement and maintenance of highways and bridges which receive aid from the state and compel compliance therewith by road officials. The Commission shall also, when requested, advise towns, villages and counties with regard to the construction and maintenance of any road, and shall lay out and construct a system of prospective state highways. After this follows the creation of the county road boards, which are to have the supervision and direction of the expenditure of all funds derived from taxation, issuance of bonds, gifts or bequests, or from any other source in their respective counties. They are also authorized to select and lay out a system of prospective county highways, and in laying out such system, they are to cooperate with, and be advised by, the State Highway Commission. {^{*49}} After such a system is laid out each board is directed to employ a county surveyor to prepare a map in accordance with instructions to be prescribed by the State Highway Commission, to show the system of highways, and after such map has been filed with the State Highway Commission, the board is authorized to alter or increase their system, with the consent and approval of the State Highway Commission.

The above statement, I believe, shows every point at which the State Highway Commission can come in contact with the operations of the county road boards, and it does not appear that the State Highway Commission is authorized to interfere with the county road boards and their laying out systems of prospective county highways.

As to how far the county road boards may effectively go in the direction of establishing new roads, is not entirely clear, especially if such roads involve the necessity of taking private property for public use, as the legislature does not appear to have taken away from the county commissioners the power of condemnation of land for highway

purposes provided in Chapter 124 of the Laws of 1905, nor to have vested any such power in the county road board. This, however, is aside from the question which you ask my office.

That question is, specifically, whether you or the State Highway Commission has authority to prevent the county road board from building and constructing a road, land for which has been condemned by the county commissioners. I am unable to see that the State Highway Commission has any such control over the county road boards. Its duty towards the county road boards appears to be to co-operate with and advise them, and to control alterations or increases in the system of county highways after that system has once been laid out by a county road board.

As to your individual powers as a member of the Commission, by Section 10 of Chapter 42 of the Laws of 1909, you are made "the engineer of the roads commission and subject to the orders of said commission, and shall have supervision of the construction, maintenance and repair of all highways and bridges in this act, and shall have supervision of all county bridges built by contract where the (amount) thereof exceeds the sum of one thousand dollars, and no county bridge which exceeds in cost the sum of one thousand dollars shall be constructed until the Territorial Engineer shall have first approved the site for such bridge, the contract and specifications therefor." The awkward phrase as to "highways and bridges in this act" must refer to the highways and bridges mentioned in Section 3, and be limited to the highways and bridges constructed or maintained, in whole or in part, by the aid of state moneys. I find no mention anywhere else of the State Engineer, either as such, or as a member of the State Highway Commission, in connection with the subject of roads.

I am unable to discover that you, as State Engineer, or as a member of the State Highway Commission, or the Commission itself, can have any power to control or override the action of the local {50} county authorities in determining upon the construction of a road.