

Opinion No. 31-21

January 21, 1931

BY: Frank H. Patton, Asst. Att'y General

TO: Hon. W. C. Davidson, State Highway Engineer, Santa Fe, New Mexico. Attn. Bert R. Thomas, Chief Draftsman,

{*27} This office has given consideration to the matter set forth in your letter {*28} of January 20th, which has reference to the rights of a homestead entry-man condemnation proceedings having been instituted for the purpose of obtaining a right-of-way over the homestead.

This office believes that the question turns upon the right of the entry-man to alienate a portion of the homestead property, and we are unable to find any statutory provision, either state or federal, which covers the specific instance at hand.

Section 2288 Revised Statutes "Federal", also cited as Section 174, Title 43, United States Code, Compact Edition, provides that a bonafide settler, under the homestead law, shall have the right of transfer as to any portion of his claim for church, cemetery or school purposes, and for the right-of-way for railroads, telegraph, telephone, canals, reservoirs or ditches for irrigation or drainage, and that such transfer for such purposes shall in no way vitiate the right of the homesteader to perfect his claim.

This act of the Federal Laws is all we have been able to find upon this question, and, inasmuch as the public purposes for which alienation can be made is set forth in the act, it is therefore confined to such purposes, and as the right-of-way for highways is not mentioned it cannot be considered under this section.

Section 164, Title 43, United States Code, Compact edition, provides for the oath to be taken when final proof is made and one provision therein is to the effect that no part of such lands has been alienated, except as provided in the above cited section. It is apparent, therefore, that no other alienation of property can be considered unless by permission of the Federal Government having power to give such permission.

Our State Statute is silent upon this question and, of course, any provision changing or materially affecting the provisions of the Federal Statute would be unconstitutional and void.

Inasmuch as the question involved is one concerning entry-men and settlers upon the public domain, it is suggested that the matter be referred to the United States District Attorney at Albuquerque for his suggestions. It is the policy of this office to consult with that official upon questions of a Federal nature.

In so far as your right to condemn is concerned there seems to be no question, but as to the rights of the entry-men to accept money by way of compensation, or damages, then it would appear that the matter should be submitted to the proper Federal authorities, and either obtain a waiver of some kind or perhaps, if possible, secure a relinquishment from the entry-men in so far as the particular amount of the property is concerned, and the amount necessary for your purpose.

From our conversation with you, however, we doubt if the entry-men would make such relinquishment and your relief, in all probability in so far as protection of the entry-man himself is concerned, lies with the Federal authorities.