

## Opinion No. 32-377

January 12, 1932

**BY:** E. K. Neumann, Attorney General

**TO:** Mr. W. R. Eccles, State Highway Engineer, Santa Fe, New Mexico.

{\*139} This is in reply to your letter of January the 11th, in which you ask the following questions:

1. How may right of way be secured from a homesteader who has filed on land but has not as yet obtained patent, but is willing to give right of way? Since he cannot sign a warranty deed, or easement for right of way without prejudice to his homestead right, would it be legal for him to sign a quit claim deed for the right of way?

2. In the case where the land has been entered as a homestead, but patent not yet obtained and the entryman refuses to give right of way, is it possible to get an injunction or court order that would allow the construction of a Federal Aid or State Aid highway and the holding of the right of way until such time as patent is obtained and the land can be condemned?

Answering your first question, in my opinion it would be proper for the entryman to grant an easement for right of way and that he would not prejudice his homestead rights by so doing.

"Nor do I think an agreement or understanding with a neighbor for a roadway over a homestead conflicts with the affidavit of the applicant that the same is taken for his 'exclusive use and benefit.' Everyone holds his property subject to such easements; and an applicant for a homestead may certainly come to an agreement on the subject with those interested before making his entry without laying himself liable to the imputation that he is falsely entering land in his own name for the use and benefit of another. Indeed, congress has expressly declared (Rev. St. No. 2288) that an applicant or occupant under the pre-emption or homestead law may convey a right of way for a railroad across the pre-emption or homestead without thereby vitiating his right to perfect his title. And doubtless it should be held that an agreement for any public or private way, to be laid out over it, is within the equity of this statute." U. S. vs. Reed, 28 Fed. 489.

In answer to the second question, it is my opinion that the proper remedy would be to bring condemnation proceedings against the entryman.

It was held in the case of Schmidt vs. Drainage Dist. No. 17 (1919) 215 S. W. 614, 140 Ark. 541 that United States land which had been entered upon under homestead laws by one to whom patent had not yet been issued was subject to eminent domain for

drainage purposes and I see no reason why, under the same conditions, it should not be subject to eminent domain for highway purposes.

In view of *A. T. & S. F. Ry. Co. vs. Richter*, 20 N.M. 278, 148 p. 478, it would also appear that condemnation proceedings are necessary. This case holds, in effect, as follows:

"An entryman of coal lands of the United States who has filed a declaratory statement in the United States Land Office, under the provisions of sections 2347-2349, R. S. U. S. 9 sections 4659-4661), has a possessory right to the land of such a character as to render unlawful an entry thereon by a railroad corporation for railroad purposes, previous to {*\*140*} condemnation proceedings."

Trusting that this gives you the information desired, I am

By: Quincy D. Adams,

Asst. Attorney General