Opinion No. 52-5624

December 31, 1952

BY: Joe L. Hartinez, Attorney General

TO: State Highway Department State Capitol Santa Fe, New Maxico. Attention: Mr. L. D. Wilson, Administrative Engineer

On April 20, 1948, you requested an opinion of my predecessor which involved several general questions concerning rights-of-way. Although this matter has been discussed with you on several occasions, no written opinion was rendered, and since that date you have requested a written opinion of this office.

Your correspondance indicates some nine questions involved. These questions are set forth below. It is particularly difficult to answer in generalizations a legal point. The facts of each particular circumstance as it arises very often involve points which bring into the inquiry other principles of law or procedure, or reflect a different light on the subject then those herein set forth. However, a general background of the legal principles involved may be helpful to your department. For this reason my answer to your first question is presented at some length. Reference to it is also made in discussing subsequent questions.

1. **Whether regulation Sec. 1.18 (b) (now 1.17 b. of the January 16, 1951 reprint) of the regulations of the Commissioner of Public Roads is valid, and whether it can be enforced against the Highway Department**.

Sections 1.17 (a) and (b) read as follows:

Sec. 1.17 Traffic Signs and signals. (a) All signs and traffic-control devices and other protective structures, whether paid for from Federal or other funds, erected on or in connection with highways or structures on which Federal funds are expended, shall be in conformity with such manual or uniform traffic-control devices as may be adopted by the American Association of State Highway Officials, approved by the State Highway department, and concurred in by the Commissioner.

(b) The rights-of-way provided for Federal-aid highway projects shall be held inviolate for public highway purposes and no signs (other than those specified in paragraph (a) of this section), posters, billboards, roadside stands or other private installations shall be permitted within the right-of-way limits. Sec. 1.17 (a) and (b), January 16, 1951 reprint)

Sec. 23, U.S.C.A., 19 sets forth the authority from Congreas by which the Secretary of Agriculture promulgated "all needful rules and regulations for the carrying out of the provisions of this chapter". Subsequently, his duties were transferred to the Secretary of Commerce, and the present rules were recommended by the Commissioner of Public Roads and issued by the Secretary of Commerce. The Secretary of Commerce no

doubt has broad discretion in determining what is a satisfactory right-of-way under the circumstances. His regulations, however, must be reasonable. Although I feel that this particular regulation relates only to signs, as later set forth, we will assume the question is whether the requirement that all rights-of-way be held **inviolate** for public highway purposes is an unreasonable regulation.

The term "inviolate" is commonly used in state constitutions in guaranteeing the right of trial by jury. New Mexico's Constitution, Article II, Sec. 12, provides "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate". Sec. 18-109 NMSA 1941 makes it the duty of attorneys "(5) to maintain inviolate the confidence and preserve the secrets of his client;" Webster's International Dictionary, second edition, defines it as "not violated, unimpaired, unbroken and unprofaned".

If the use of the term "inviolate" in the regulation means that all rights-of-way for federal aid highways must be absolutely free from impairment from the center of the earth below to the skies above, and that it is immune from all use or regulation other than strictly highway purposes, it is quite possible that the regulation would be deemed unreasonable and extending beyond the powers of the Secretary of Commerce.

Every effort should be made to construe the regulation and the term "inviolate" so as to validate it. In construing the term, the following holdings are suggestive:

"The constitutional guaranty that right of trial by jury shall remain 'inviolate' guarantees freedom from substantial impairment, but does not prohibit modification of the details of administration which leave enjoyment of the right unaffected. Commonwealth v. Pugmann, 196 A 99, Ill; 330 Pa. 4.

It in no sense imports immunity from all regulation Humphrey v. Eakley, 60 A 1097, 1098; 72 N.J.L 424; also State v. DeLorenzo 79 A 839, 840; 81 N.J.L. 613.

It connotes no more than freedom from substantial impairment and the Legislature has a right to make any reasonable regulation or condition respecting the enjoyment * * *, provided only that the essentials * * * remain unchanged People v. Peete, 202 P. 66; 54 Cal. App. 333; also State v. Furth, 104 P2d 929; 5 Wash 2nd 1.

There are many indications that the use of the term inviolate in the regulation has been liberally construed by the Secretary of Commerce and the Commissioner of Public Roads themselves. Certainly the use of the right-of-way by public and private utilities and by railroads is contemplated in regulation Section 1.10(j) and Section 1.14. Regulation 1.11 dealing with Federal participation in rights-of-way does not require that title in fee simple, free and clear of all restrictions, be obtained. Section 17 of the Federal Highway Act, 42 Stat 212, authorizing the Secretary of Agriculture to obtain rights-of-way from other government departments does not require the obtaining of a fee title, nor does the National Industrial Recovery Act, 48 Stat 200, Section 204(2) (f), nor 55 Stat 183 (43 USCA 931) providing for securing rights-of-way from the Attorney General.

Congress did not intend to authorize the promulgation of regulations that would require the Park Service, the Forest Service, Federal Power Commission and other agencies to convey rights-of-way to the state which would be absolutely free from all regulations by these branches of the government. This is not the present practice. We are informed that only special use permits are granted in the case of rights-of-way over Forest Service and Park Service lands which technically can be cancelled at the will of these agencies, and that even public domain over which a right-of-way has been granted can be withdrawn if required by the Federal Fower Commission. Rights-of-way have been eliminated for the greater public needs such as dams on conservation projects, which would inundate the highway, and highways have been closed or eliminated because of military necessities.

It should be noted that the regulation 1.17 (b) states that the rights-of-way shall be held inviolate. This indicates that they shall not be impaired or changed after once established, not that they must be perfect when established. When the project is once accepted by the Commissioner of Public Roads the apportionment of federal funds becomes a contractual obligation. 23 USCA 21a. It is then the duty of the State to maintain the highway. 23 USCA 15. Maintenance means the constant making of needed repairs to preserve a smooth surfaced highway. 23 USCA 2. There are no provisions in the laws or regulations authorizing the Commissioner of Public Roads to demand improvements or changes after the project has once been approved or constructed. He must give his consent however, in case the State wants to erect informational or warning signs or traffic signals. 23 USCA 63.

What kind of a title can the state, county or municipality acquire, therefore, is an important question.

The eminent domain statutes in New Mexico 25-901 to [Illegible Words], NMSA, 1941, authorizing condemnation by the counties and cities for highways and streets does not provide that the title to be obtained shall be in fee simple, nor does Sec. 58-207 NMSA, 1941, authorizing the State Highway Commission to condemn rights-of-way for public highways provide that the state will obtain title in fee simple. On the other hand, Secs. 14-205 and 14-210 providing for the dedication of streets and roads by the filing of a plat does provide that the city or the county, by the acceptance thereof will obtain title in fee simple and Sec. 58-105 provides that should the highway be used continuously for one year without any contract or agreement recognizing the right of ownership in another, the fee thereto shall vest in the state for highway purposes. In opinion No. 4044 rendered Mr. L. D. Wilson, Right-of-Way Engineer, on January 24, 1945, it was pointed out that title to abandoned highways reverts to the aoutting owners, and that even under Sec. 58-105 the fee merely vested in the state so long as such right-of-way is so used for highway purposes, and that "the right-of-way acquired by the public in respect of land devoted to highway purposes is ordinarily a mere easement of passage over it, with the powers and privileges incident thereto, the fee title remaining as it was before the highway was established.

An early Minnesota case, Fairchild v. St. Paul, 49 N.W. 325, states the general principle as follows:

"Upon the principle that statutes conferring compulsory powers to take private property are to be strictly construed, it has been held that when the estate or interest to be taken is not defined by the legislature, only such an estate or easement can be taken as is necessary to accomplish the purpose in view, and, when an easement is sufficient, no greater estate can be taken. It is on this principle that where the legislature has authorised the taking of land for the purpose of streets, without defining the estate that can be taken, or expressly authorizing the taking of the fee, it is held that only an easement can be taken. This is construed under such statutes to be the extent of the grant of authority. No well considered case, however, can be found which holds that the legislature may not authorize the taking of the fee, if it deems it expedient."

This may lead to an unjust situation so far as abutting owners on city streets are concerned as against abutting owners on highways outside of cities. Nichols on [Illegible Words], Volume 3, Sec. 10.221 gives as an example when an abutting owner owns the fee in the highway he has been allowed to recover additional damages for the imposition of additional servitude in the right-of-way, while one who does not own the fee was left without remedy, there being no 'taking' as to him.

The theory of the above is that when the condemnation or taking places the fee in the state, the additional use of the highway for viaducts, utility poles, grades, and other measures which might interfere with light and agress and ingress of abutting owners is warranted without further payment in damages to the abutting owners. This is not the modern view, nor has our Supreme Court adopted this theory. In the case of [Illegible Word] v. Board of County Commissioners, 35 N.M. 374, additional damages were allowed the abutting owners where a viaduct was constructed in Pacheco Avenue in the City of Las Cruces, and in the case of Springer Transfer Company v. City of Albuquerque, 44 N.M. 407, consequential damages were allowed the abutting owner caused by the building of an underpass which changed from the grade of Tijeras Avenue in the City of Albuquerque. In neither of these cases was the extent of the title of the city in the streets mentioned, but the courts must have felt that the abutting owners retained certain rights, even though the streets were rights-of-way for public purposes.

The well-reasoned Iowa case, Liddick v. City of Council [Illegible Words], holds that the condemnation of a street does not take all of the rights thereto, but that certain property rights such as rights of access, light, air, and view may remain in the abutting owner, and that he is entitled to additional compensation if these are later violated. When rights-of-way are obtained, benefits within the contemplation of interested parties at the time of the condemning, deeding, or dedication of the land for the highway may be considered so that later use of the highway which would destroy these benefits should be compensated for.

In view of the above, the requirement that the right-of-way shall be held inviolate for public highway purposes can only mean that all rights necessary for the reasonable use of the highway by the public contemplated at the time have been acquired, and that the rights will not be diminished except where greater public need or benefit is involved. Such a regulation is, of course, reasonable.

A review of the federal laws and regulations themselves can lead only to the additional conclusion that Sec. 1.17(b) intends only to provide that the right-of-way will be held inviolate with reference to signs, posters, billboards, roadside stands, and private installations, and does not purport to prohibit the use of rights-of-way by public utilities, railroads, ditches, companies, or interests of other government agencies, nor contemplate complete elimination of the rights of abutting owners.

The regulation was apparently adopted to carry out the requirements of the Federal Aid Highway Act of 1944, Sec. 12 (23 USCA (3) which deals only with signs and markings and does not attempt to restrict other uses.

2. **Can the State Highway Commission comply with this regulation**?

Although there exist some statutes which indicate that the legislature might have at one time required uses of the right-of-way which would conflict with federal regulations (See 58-704, [Illegible Words]-714 NMSA, 1941) in view of Article V, Sec. 14 of the Constitution of New Mexico, which has given the Commission the power and duty of determining all matters of policy relating to state highways and public roads, we now see no reason why the Commission cannot fully comply, as long as present appropriations from the legislature for this purpose are maintained.

3. **Can public utilities construct their lines on public highway rights-of-way as long as they are within 2 feet of the right-of-way line and in accordance with the provisions of the National Electric Safety Code without a permit from the State Highway Commission**?

This question is prompted by Chapter 30 of the Laws of 1939, (NMSA, 1941, [Illegible Word]. 58-714, et seq.).

Section 1 of that Act prohibits the erection of a pole line or placing of conduits, wires or cables on rights-of-way except in conformity with the provisions of the National Electric Safety Code in effect at the time, requires that wires or cables for power or energy have a clearance of 22 feet; that other wires or cables have a clearance of 18 feet; that underground conduits, wires and cables be buried at least 2 feet below the grade line or ditch bottom; that poles be placed within 2 feet of the right-of-way line unless written permission to exceed that distance be obtained from the State Highway Commission. It also provides for rearrangement of such structures at owner expense on notice by the State Highway Engineer of necessity to permit of widening, improvement, reconstruction or maintenance.

Section 2 of the Act prohibits placing of conduits, wires or cables parallel to and with/[Illegible Word] feet of a bridge or structure without the Commission's permit specifying the conditions of placing; and it expressly authorizes the Commission to prepare application forms for permits.

Section 3 of the Act makes any violation of its provisions a misdemeanor and prescribes penalties.

This Act does not purport to grant any rights to utilities; nor is it the source of the regulatory powers of the State Highway Commission.

An earlier statute (L. '29, c. 110; NMSA 56-207) had given the Commission the power to prescribe rules and regulations to govern the use of the public highways by the utilities and the power to remove installations for violation of such rules and regulations.

[Illegible Word] '39, c. 30 ([Illegible Word]-714 et seq.) contained no repealer. So [Illegible Word] '29, c. 110 ([Illegible Word]-207) remained in effect unless repealed by implication because of incompatibility. There is no incompatibility or inconsistency, however, between the general regulatory powers the earlier statute conferred on the Commission, and the special safety and convenience rules the later statutes prescribe as the minimum to which utilities must conform.

The two statutes interpreted together leave the regulatory power of the Commission unimpaired except in respect to the specific requirements of the 1939 Act as the minimum requirements for safety and convenience of travel and transport on the public highways, and maintenance thereof.

It follows that the Commission by its rules and regulations may require the utility to obtain a permit before commencing any construction. It can forcibly remove installations made in violation of such requirement. Indeed, it would seem to lie with the Commission, not with the utility, to determines whether the installation does in fact conform to the specific requirements of the statute (58-714 et seq.). The most the utility may claim from having made its installation in conformity with the Statute is that it has not committed a misdemeanor.

The fact that the Legislature, as a matter of public policy, and in the interest of safety and [Illegible Word] in operating and maintaining the public highways for travel and transport, has made requirements of its own, does not exclude additional requirements by the Commission reasonably adapted to greater safety and convenience.

Such additional requirements may even take the form of varying the Legislature's requirements, so long as it is kept in [Illegible Word] that the latter are the [Illegible Word]. The Commission may increase but it may not diminish that minimum standard. If the variance from the legislative standard is not patently in furtherance of greater safety or convenience, then the regulation should contain a recital that the Commission finds the variance desirable and necessary in further promotion of safety and convenience.

Such a finding would afford at least [Illegible Words] support for the new or additional requirement.

The foregoing discussion and views are based entirely on analysis of the statutes. The effect of the constitutional amendment is not considered; it being apparent that it has not diminished the Commission's powers.

So that although the answer to question three is in the negative, should the Commission adopt appropriate and reasonable regulations, I cannot concluds, however, that the Commission could refuse utilities the use of new or existing rights-of-way entirely.

Sections 72-101 and 72-102 provide legislative authorisation for corporations for the generation, production, transmission, distribution, sale or utilization of gas, electricity or steam for lighting, heating power, manufacturing or other purposes organized under the general and corporation laws of this state to place their pipes, poles, wires, cables, conduits, towers, piers, abutments, stations and other necessary fixtures, appliances and structures upon or across public roads, streets, alleys and highways in this state, subject to regulation by the county commissioners and local authorities. Telephone companies have been included within this definition. City of Roswell v. Mountain States Tel. & Tel., 78 Fed. 2d, 379; Village of Ruidoso v. Ruidoso Telephone Company, 52 N.M. 415. However, when their [Illegible Word] is cancelled, both cases hold that the city can require the removal of the fixtures from the streets.

It would seem, therefore, that rights-of-way are acquired by the county not only for the transportation of freight and personnel, but also for the transportation of electricity, communications, water, gas and perhaps other commodities sent through pipes or cables, rather than on wheels. This is no doubt one reason why wide rights-of-way are deemed justifiable. Pursuant to Sec. 58-228 NMSA, 1941, rights-of-way deemed necessary by the State Highway Commission for construction under the supervision of the Commission are acquired by the county. [Illegible Word]-230, by the same law (Laws of 1917, Chapter 38) provides:

"No pipe-lines, poles or telephone or electric transmission lines or railways, authorized to be placed on or along roads constructed or improved under the provisions of this act, shall be located except in accordance with rules and regulations prescribed therefor by the state highway commission."

This would seem to require the Commission and the county to foresee the use by utilities of the rights-of-way and to obtain sufficient rights-of-way to accommodate them. Their location, however, would be within the discretion of the Highway Commission, with foremost thought to public need and necessity and the safety of the travelling public. The rights of the state come first and the acceptance of the easement by the utilities was with this understanding. See Attorney General's Opinion No. 5222 to Burton G. Dwyre, June 9, 1949.

4. **Can rural electrification authorities use highway rights-of-way without permission and locate their poles within the rights of way at their discretion**?

Sections 48-401 to 48-432 NMSA, 1941, provide for the organization of rural electric cooperatives. Section 48-403(k) gives the cooperatives power

"To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation all roads, highways, streets, alleys and bridges and upon, under and across all publicly-owned lands."

In view of Article IV, Sec. 26 of our Constitution, I do not feel that the legislature intended to confer any greater rights or privileges upon rural electrification cooperatives as to their use of rights-of-way than were permitted other public utilities. Article IV, Sec. 26 reads:

"The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporation; * * *."

These cooperatives are, therefore, subject to the same regulations by the Highway Commission and the county or municipality for the use of the rights-of-way as any other public utility, and would be subject to the penal features of Sec. 58-714 to 58-[Illegible Word] inclusive above referred to. These cooperatives receive their franchise from the public or the state as do other utilities. Hale v. Parmers Electric Membership Corporation; 44 N.M. 131. Their rights are subject to the limitations necessary for the public welfare.

5. **Must either these cooperatives or other utilities [Illegible Word] permits for the use of highway rights-of-way from the State Highway Commission?**

Sections 58-714 and 58-715 NMSA, 1941, appear to be the only statutory provisions requiring such a permit. Under these sections, unless a permit is acquired, it is declared a misdemeanor to place poles beyond two feet from the [Illegible Word] right-of-way line or to place any conduit wires or cables across, upon, attached to or upon the highway rights-of-way parallel to and within twenty-five feet of any state highway, bridge or structure. I see no reason, however, why the Commission, when the right-of-way is acquired, may not provide that permission be obtained for the location of utility lines upon the rights-of-way, and further limit the construction of these lines, without regard to the limitations provided in Sections 58-714 and 58-715.

6. **Can the public roads administration require that pole lines be located off the highway rights-of-way entirely, or that they be placed at locations that it might determine proper, regardless of the decision of the State Highway Commission as to the proper location**?

Although it does not appear to be the intent of the laws or the regulations concerning federal aid roads that rights-of-way be limited to the transportation of commodities by wheeled vehicles alone, no doubt the Secretary of Commerce could require that no utilities be placed in the highway rights-of-way at certain points, or be located only where the Commissioner felt best if in his opinion it was necessary for the safety and well-being of the traveling public. Our perusal of the law indicates that both Congress and the Secretary contemplate utilities being located in the rights-of-way. The law allows the Secretary large discretion in determining the width of the rights-of-way. Sec. 10 USCA, Title 23 provides that the right-of-way shall be of **ample width** and the wearing surface of not less than 18 feet. Nevertheless, this may be minimized if in the opinion of the Secretary "it is rendered impractical by physical conditions, excessive costs, prohibitive traffic requirements or legal [Illegible Word]."

In authorizing the Secretary to promulgate rules carrying out the provisions of the law, it would seem that he could promulgate any rules and regulations necessary "for preserving and protecting the highways and insuring the safety of traffic thereon" (23 USCA 19). Unless his rules and regulations were arbitrary, his decision is controlling where federal funds are used.

The federal aid laws do not seem to contemplate a regulation that poles shall be removed from rights-of-way entirely. Even in a case of strategic highways where federal funds may participate in the acquiring of rights-of-way, there is no provision in the law that the rights-of-way must be free from utilities (23 USCA 114).

In view of these laws and regulations and since the safety and benefit to the travelling public is the basis for right-of-way requirements for both state and federal laws, and for the regulations of both the Secretary of Commerce and the State Highway Commission, there should be few cases of disagreement. When these arise, however, unless the Secretary of Commerce ruling is clearly arbitrary, it would control if federal funds are involved.

7. **Can the Public Road Administration require the State Highway Commission to prevent all parking and servicing of vehicles on the right-of-way and to channelize turnouts, and, if so, can the Commission comply with these requirements where it would be [Illegible Word] to a private business**?

I know of no right in an abutting owner to use the highway right-of-way other than for reasonable agress and ingress to his property, lateral support, and for freedom of light, air and view as indicated previously in this opinion. Unless some agreement is made with the abutting owner at the time the right-of-way is secured, he would have no right to park or service vehicles in the right-of-way. However, his rights to ready agress and ingress to his property from the highway could only be interfered with if necessary for the public safety and welfare in the use of the highway, and should he be required to travel by circuitous route to get to his property, he would no doubt be entitled to damages, and these might include loss of business.

On at least two occasions, the Supreme Court of New Mexico has ruled that the abutting owner has no right to the maintenance of a public highway in any particular place; that public roads are not built primarily for the benefit of the occasional land-owner along the route, but are for the necessity and convenience of the general public, and the landowner has no vested right in the current of public travel (Tomlin v. Town of Las Cruces, 38 N.M. 247; Board of County Commissioners v. Slaughter, 49 N.M. 141)

If a garage or filling station was in operation when the right-of-way was established, no doubt it received compensation for the location for the right-of-way as it now is, and probably loss of business as a result was taken into consideration. Should the right-of-way be removed but access to the service station left readily available, as in the Slaughter case, no damages are payable to the owner, as his rights were not affected. Should ready access to his station, however, be denied him after the right-of-way has been once established, or should it be changed, widened or obstructed later, and he has been compensated for it only as it previously existed, it would seem that he would have an additional claim for damages for which he was not compensated at the time. Such circumstances would fall more within the holdings of the Supreme Court in the Summerford and the Springer Transfer Company cases previously cited.

The continuous unauthorized use however, of the right-of-way, for servicing and refueling vehicles alone could not be established as a right, as neither prescription nor the statute of limitations would run against the state. Martinez et al v. Cook, 1952 N. M., 244 P.2d 134 (advance sheets).

The State Highway Commission could, of course, legally comply with all the requirements the Public Roads Administration might demand for clearing the rights-of-way and channelizing turnouts, if necessary, for the public safety. Additional condemnation proceedings could be brought and additional damages awarded if the rights of the abutting owner are interfered with to their damage.

In the instance submitted by the District Engineer from Roswell act forth in your letter of February [Illegible Words], concerning New Mexico Project F-48(3), the abutting owner contemplates placing a filling station at the junction of the new and the old roads. This junction is now protected by guard posts, which the adjoining owner wishes to remove. As stated in the letter of February 27, 1948, from Assistant Attorney General Robert W. Ward, the highway Department has not only the right but the duty to provide such safety measures as are necessary, and if the guard posts are necessary they should be maintained. On the other hand, if the property owner has been damaged beyond the compensation which he received at the time of the condemnation, he might have a cause of action against the county, as in the Summerford case. In this case his damages could hardly include loss of business as the station had not been constructed, and from the brief facts presented, it would appear that be might have been fully compensated at the time of the original taking.

The New Mexico case of Zamora v. Middle Rio Grande Conservancy District, 44 N.M. 364, at Page 372, quoting from Lewis Eminent Domain, Third Edition, Sec. 821, throws

some light on the question of damages permitted subsequent to the establishment of the highway. We quote:

"Where a subsequent claim for damages is made, arising from the construction of works, the question will be whether the works have been constructed in a proper manner, and whether the damage necessarily results from the works as so constructed. If these questions are answered in the affirmative, then the damages complained of will be presumed to have been considered in estimating the damages, and no further recovery can be had. If they are answered in the negative, then a recovery can be had in an appropriate common law action. If the damages are assessed after the works have been constructed, all damages occasioned by such construction and by the use and maintenance of the works in their then condition, will be presumed to have been included and no subsequent action will lie therefor."

In case a highway had been condemned or acquired right up to a gasoline pump which thereafter operated from the curb and serviced automobiles in the right-of-way, it might well be that additional damages could be recovered if the servicing in the right-of-way was prevented. On the other hand, if the gas pump was placed on the property line after the highway right-of-way was established, there would seem to be little doubt but that servicing of the automobile in the right-of-way could be enjoined by the state, county or municipality, without payment of further damages.

8. **You have stated that the Public Roads Administration has indicated that there is a federal or state law which establishes a right-of-way of either 60 or 66 feet on section line roads, and that although the present right-of-way may be considerably less than that width, it is contemplated that public property owners are not entitled to compensation when the right-of-way is widened, except for those distances beyond that established by the law**.

Perhaps the public roads engineer had in mind Title 43 USCA 932 which reads:

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

This act was passed July 26, [Illegible Word] (c 262). Some time later, the New Mexico legislature passed what is now Sec. 58-401 NMSA 41, which reads:

"County bridges are parts of public highways and must not be less than 16 feet in width; **when practicable, the county commissioners shall declare all townships and section lines, public highways of not less than 40 feet in width, when there is no improvement, no compensation shall be paid for such highways**.

In [Illegible Word] Sec. 56-402 NMSA 1941 was passed. It reads:

"All public highways laid out in this state shall be [Illegible Word] feet in width unless otherwise ordered by the board of county commissioners."

In the case of [Illegible Word] A. Hubbell Co. v. Gutierrez 37 N.M. 309, an injunction was brought against the county commissioners who had, pursuant to Sec. [Illegible Word]-401 above quoted, declared a highway along a section line on this plaintiff's property. The Supreme Court held that the federal law, 43 USCA 932 above quoted, was a continuing offer by the United States, and that it could have been accepted by the New Mexico legislature so that the grant might have been consummated by a declaration that all or specified section lines should be public highways, and that he who subsequently acquired lands from the government would then take subject to this grant, but that if in the meantime, and before there was any acceptance by either the state or the county under Sec. [Illegible Word]-401, the government had conveyed the land to a private owner as in this case, then it was free of any declared right-of-way along the section lines. The Court also held that the provision stating that no compensation shall be paid where there were no improvements was unconstitutional, where private ownership was acquired before the highway was declared.

In the more recent case of Lovelace v. Hightower, 50 N.M. 50, the question was before the Court whether a highway could be established over public lands by the mere use thereof so as to be binding upon a subsequent patentee, and the Court held that a highway could be established over public lands by the continued use of the road by the general public for such time and under such circumstances as to clearly prove an acceptance of the offer; that the time required for the establishment was not limited by any limitation statute, but as the Supreme Court of the United States pointed out, in the case of Cincinnati v. Whites' Lessee 8 L. Ed 452, the use ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. The Court held that a public highway could be established by use alone or by acceptance by the public authorities.

It is quite possible, therefore, that if highways have been established along section lines or other places over public domain by declaration by the county or by continuous use prior to the time the same land has been patented to an individual, such individual would take it subject to the easement.

If the county had declared the particular section line highway to have a 40 or 60 foot right-of-way, it would seem that the adjoining owners would take subject to the right-of-way at the width declared, and if widened, would not be entitled to compensation except for property beyond that right-of-way limit. Of course, the county under Sec. 58-402 could probably have declared a right-of-way in excess of 60 feet and if no right-of-way was designated, perhaps a 40 foot width could be assumed under the statute up until 1905, and a 60 foot width thereafter under Sec. [Illegible Word]-402.

If no right-of-way was acquired over public domain prior to its being patented, the state or county could, of course, acquire a right-of-way by use alone. See Attorney General's Opinion No. 4641, January 19, 1945.

You are familiar with the one year statute, Sec. 58-105 NMSA 1941. This provides for the vesting of the fee in the state after one year's continuous use by the public, and states:

"so long as such right of way is used for highway purposes."

39 C.J.S. Sec. 20, pp. 937 and 938 cited in Attorney General's Opinion No. 4641, reads as follows:

"User sufficient to create a highway by prescription establishes the public character of the road or highway. The width of a highway so created is generally coextensive with the extent of actual user for road purposes, and comprehends not only the traveled tract but also such other land as is actually, reasonably, and necessarily used for highway purposes incidental to the use of the tract."

Sec. 58-401 is an indication that the legislature contemplated that a right-of-way 40 feet in width was reasonable or necessary for highway purposes up until 1905 when Sec. 58-402 was passed indicating that 60 feet was necessary. This would be some indication of what a Court might construe as a necessary width acquired by the use of the road. However, it would not be conclusive, and where both sides of the road have been fenced or used by adjoining owners for other purposes so as to narrow the portion actually open and used by the public, it cannot be said that a greater width was acquired. On the other hand, it is possible that a width exceeding 60 feet may have been acquired by evidence of use in particular locations.

It might seem that abutting owners would not be entitled to compensation for land already used for highway purposes, and the fee of which has vested in the State of New Mexico under Sec. 58-103. However, Sec. 58-105 is not a limitation against the right for damages. It merely provides that title passes to the state and does not provide that rights of those to whom the property formerly belonged for damages for its loss cannot be recovered. If it did so provide, it might be in conflict with Article II, Sec. 20 of the New Mexico Constitution, which provides:

"Private property shall not be taken or damaged for public use without just compensation."

Sections 25-922 and 25-923 NMSA, 1941, read as follows:

"25-922. Any person, firm or corporation authorized by the constitution or laws of this state to exercise the right of eminent domain who has heretofore taken or damaged or who may hereafter take or damage any private property for public use without making just compensation therefor or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation thereof, shall be liable to the owner of such property, or any subsequent grantee thereof, for the value thereof or the damage thereto at the time such property is or was taken or damaged, with legal interest, to the date such just compensation shall be made, in an action to be brought

under and governed by the Code of Civil Procedure of this state; Provided that this act (as. 25-922, 25-923) shall not apply to or affect any telephone line, telegraph line, electric light or power transmission. (Laws 1923, ch. 21, Sec. 1, p. 32; C. S. 1929, Sec. 43-301.)"

25-923. The defendant or defendants to any such action may plead adverse possession as defined by Sec. 3365 (Sec. 27-121) of the New Mexico Statutes Annotated, Codification of 1915, as a defense to said action, but no other statute of limitation shall be applicable or pleaded as a defense thereto. (Laws 1923, ch. 21, Sec. 2, p. 32; C. S. 1929, Sec. 43-302.)"

Sec. 27-121 referred to is the ten year statute of limitations which provides that suit may not be brought for lands against one who has had adverse possession of the same in good faith under color of title for a period of ten years. This statute contains a proviso that if the person entitled to bring the suit is in prison, of unsound mind, or under the age of 21, he shall be permitted to bring the action one year after the termination of his disability.

In the Summerford case above cited, the contention was made that Sec. 25-922 did not apply to public officers or agencies of the state, but the Supreme Court held otherwise, and permitted judgment against the county.

It would appear, therefore, that if the road and the right-of-way had been used for over a period of 11 years, any claim for damages or for the taking by the abutting owners would be barred by the statute of limitations, in the event Sec. 58-105 is relied on for the taking. In other words, it might be contended that the taking was not complete until the one year use had expired and the fee had vested in the state, and that the 10 year statute ran from that date.

The practical aspects of this matter deserve some consideration. It would be unsafe in many cases to bring condemnation proceedings against merely that portion of the highway required for the increased width of the right-of-way. The width already acquired by public use might be in doubt. The statute may not have run against those persons under disability and furthermore, there is no record title in the county or the state of the existing right-of-way. It would probably be better for the counties to bring condemnation action against the entire right-of-way, alleging in their petitions the extent of the old right-of-way already claimed by the county or the state by virtue of the use, and instruct the commissioners to base their assessment on the additional strips required from the abutting owners. This would involve additional work in preparing the survey as both the width alleged to have been previously acquired by the county and the additional width for which payment is to be made would have to be shown.

9. **Whether irrigation ditches and canals located within the present highway right-of-way can be ordered removed by the Commission, where their existence is detrimental to the safety of travelling public, at the expense of the owners, and if removal is necessary [Illegible Word] highway improvements**.

If the ditch was on the right-of-way prior to the time the highway was built, and no condemnation proceeding was brought nor title to the property covered by the ditch obtained from the owners, and the ditch is still in use, it cannot be said that the ditch has been taken, and therefore it could not be ordered removed without payment to the ditch owners for the taking, as would be the case in any privately owned property. However, if the ditch had been condemned and the owners paid for it, or if it had gone into disuse and the state has used it in its right-of-way so as to have acquired title under the one year statute, then the ditch could be obliterated.

The difficult question arises where the rights to the ditch have not been acquired by the state or county and it is still in use, but its removal is necessary for improving the highway. The early New Mexico case of Albuquerque Land and Irrigation Company v. Gutierrez 10 N.M. 177 said:

"It is undoubtedly true that the diversion and distribution of water for irrigation and other domestic purposes in New Mexico, and other western states where irrigation is necessary, is a public purpose."

This was upheld in the case of City of Albuquerque v. Garcia, 17 N.M. 445, and is still the law in New Mexico. In that case, an attempt by the City of Albuquerque to condemn an irrigation ditch for a street by the city was not permitted. The Court held that the power to condemn property already subjected to a public use conferred upon the city by Chapter 97, Laws of 1905, could not be inferred from the general terms of the statute, and held

"To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear from the fact of the enactment, or from the application of it to the particular subject matter of it, so that by reasonable intendment, some special object sought to be obtained by the exercise of the power granted could not be reached in any other place or manner."

Chapter 97, Laws of 1905, is set forth as 25-915 NMSA, 1941, and reads:

"In addition to the purposes hereinbefore specifically mentioned for which property may be condemned under the provisions of this chapter (25-901 - 25-921), said property may also be condemned by the state, any county, municipality or school district, for * * * * roads, streets, alleys, thoroughfares * * *"

From the above, it appears that the same statute followed by the state and county in their condemnation proceedings was followed by the city. The general rule, however, that property devoted to one public use cannot be condemned for another public use does not apply where the power of aminent domain is being [Illegible Word] by the sovereign itself, such as the state or federal government for its immediate purposes, rather than by public service corporation or a municipality (29 CJS Sec. 74, Page 862), so that although Sec. 29-915 included the state, standing alone it could not be interpreted to mean that the state would have no greater powers than the city, but would

probably be interpreted as to the state as an implementation or an executing statute for its greater and original powers.

Unless given to others by the Constitution, the power of eminent domain rests in the legislature, and the legislature may declare which public use is of the greatest importance so as to permit condemnation by one public corporation or agency over another. Often, unless authorized by the legislature, courts will not undertake to determine which of the two uses is more beneficial to the public (29 C.J.S. p. 862). In New Mexico, the legislature has authorized the courts to determine conflicting rights of two public utilities, railroads, telephone or telegraph companies (Sections 25-912, 25-913, NMSA, 1941), but as to irrigation companies and others involving ditches, the powers of each must be determined by the statutes under which they are organized, or other laws on the subject.

There are many different types of ditches, and in each case we must look to the statutes to see if the legislature has granted rights to the owners of these ditches for use of the rights-of-way or for a dominant right of aminent domain over the right-of-way for highway purposes.

[Illegible Word] - Sec. 77-103 gives the right of eminent domain to the United States, the state, any person, firm, association or corporation to acquire rights-of-way for the construction of reservoirs, canals, ditches, etc., but provides that in all cases they shall be so located as to do the least damage to private or public property consistent with proper use and economical construction. It authorizes surveyors and engineers to enter upon lands of the state for the purpose of making aurveys and for selecting the location of suitable sites for reservoirs, canals, pipe lines and other watercourses.

As to ordinary privately owned irrigation ditches, it would appear that the legislature, by penal statutes, has placed the responsibility of not interfering with public highways upon the owners of these ditches, even though they be for a "public use" as defined in the Garcia case. Sec. 58-605 provides that no persons shall dam waters of a stream so as to overflow a road nor permit irrigation or drainage waters to overflow a public highway, (58-608) and if they must cross the roads, it is the obligation of the owners to construct the bridge, drain or flume (58-609 to 58-610) so as to keep the highway open for safe and convenient travel. Sec. 58-207 conferred upon the Highway Department the powers to prescribe rules and regulations, the conditions under which not only utilities but also ditches may be placed along, across, over and under public highways. We feel, therefore, that as to private ditches, the Commission could require such measures taken by the ditch owners to protect the highway and even to remove the ditch from the highway entirely if there was no other means of providing safe and convenient travel on the right-of-way. The same would seem to apply to community acequias and ditches.

WATER USERS' ASSOCIATIONS. As to water users' associations organized under the provisions of Sections 77-1601 to 77-1609, the legislature has provided as follows by Sec. 77-1609:

"Rights-of-way -- Eminent domsin. -- Such associations shall have the right-of-way over all lands formerly belonging to the territory of New Mexico, for its canals, ditches or other works, and shall have and exercise the same right to enter upon property to make surveys, and the same right to take and acquire lands and rights-of-way for their reservoirs, canals, ditches and works, as is provided by Sec. 5892 (Sec. 77-103). (Laws 1909, ch. 76, Sec. 9; Code 1915, Sec. 5653, C. S. 1929, Sec. 150-109)

If the ditch right-of-way had been acquired over lands formerly belonging to the State or Territory before the existence of the highway, there is some doubt as to whether the Highway Commission could require its removal. It is felt, however, that this statute does not necessarily create a dominant right-of-way nor one that could not be regulated by the highway department under its powers given by Sec. 58-207 or its even broader powers now provided in the Constitution by the amendment, Article V, Sec. 14, which will be discussed later.

DRAINAGE DISTRICTS. As to drainage districts organized under the previsions of Sec. 77-1801 to 77-1956, Sec. 77-1919 gives them the right to condemn rights-of-way for outlets, and 77-1956 the right to condemn for drainage ditches and although the laws do not specifically provide that such condemnation may be of public property, Sec. 77-1919 does provide

"* * * rights-of-way which shall be so located so as to do the least damage to private or public property consistent with the proper use and economical construction of such cutlet."

Since statutes conferring the power of eminent domain are strictly construed (City v. Garcia, supra), it is doubtful if drainage districts organized under these statutes could condemn a right-of-way over a state highway or could object to regulation or relocation of their outlets or ditches by the Highway Commission. It would appear that the Commission could require the removal of their ditches from the highway if necessary.

DRAINAGE DISTRICT UNDER FEDERAL RECLAMATION PROJECTS. The section providing eminent domain for these districts organized under Sections 77-2001 to 77-2006 is Sec. 77-2020, which reads as follows:

"The Board shall also have the right to acquire by purchase or condemnation all lands, rights-of-way, franchises, canals, ditches and other water conduits or other property necessary for the use of the district or for the construction, use, maintenance, repair or improvement of its canals, ditches or other conduits or drainage works for the enlargement or extension thereof."

This does not specifically authorize condemnation of property already devoted to a public use, and therefore these organizations would have no greater rights than drainage districts organized under Sec. 77-1801 to 77-[Illegible Word].

IRRIGATION DISTRICTS. Irrigation districts organized under the provisions of Sections 77-2101 to 77-2160 have been given broader privileges by Sec. 77-2130, which reads as follows:

"The board of directors shall have the power to construct the said works across any stream of water, water-course, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross; and if said board and the owners or controllers of the property so to be crossed cannot agree on the amount to be paid therefor, or as to the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided by law in respect to the taking of land for public uses. The right-of-way is hereby granted to locate, construct and maintain said works or reservoirs, over, through, or upon any of the lands which are now, or may be the property of the state. (Laws 1919, ch. 41, Sec. 26, p. 91; C. S. 1929, Sec. 73-226.)

This section appears to be complete and explicit, and although we believe the Commission could designate the location of the ditch or crossing within the highway right-of-way, we doubt if it could require the complete removal thereof without further legislative direction.

IRRIGATION DISTRICTS COOPERATING WITH THE UNITED STATES UNDER RECLAMATION LAWS. These organizations provided for by Sections 77-2201 to 77-2353 have been given by Sec. 77-2220 similar rights to those conferred upon irrigation districts organized under the proceeding chapters as provided in Sec. 77-2130 above-quoted.

ELECTRIC IRRIGATION DISTRICTS. These organizations provided for by Sections 77-2401 to 77-2457 have, by Sec. 77-2426, been given similar rights as irrigation districts and irrigation districts cooperating with the United States above set forth.

CONSERVANCY DISTRICTS -- organized under the provisions of Sections 77-2701 to 77-3124 are given very broad powers. Sec. 77-2718 NMSA, 1941, reads in part as follows:

"In order to protect the life and property within the district and to protect and relieve lands subject to overflow or washing, or which is menaced or threatened by normal flow of flood or surplus or overflow waters in any natural watercourse, etc. * * * * the board is authorized and empowered * * * to construct, reconstruct or enlarge, or cause to be constructed, reconstructed or enlarged, any and all bridges that may be needed in or out of said district; to construct, reconstruct or elevate highways and streets; to construct or reconstruct any and all of said works and improvements along, across, through or over any public highway * * * and shall have the right to acquire by donation, purchase or condemnation * * * any real or personal property, public or private in or out of said district for rights-of-way and such other things * * * not inconsistent with the purposes of this act (77-2701 - 77-2926, 77-3001 - 77-3024) and to replot and subdivide

land, open new roads, highways, parks, streets and alleys, and change the location of existing ones."

Section 77-2720

(1) The district, when necessary for the purposes of this act (Secs. 77-2701 - 77-2928, 77-3001 - 77-3024), shall have a **dominant right** of eminent domain over the right of eminent domain of private or public corporations.

(2) In the exercise of this right, due care shall be taken to do no unnecessary damage to others, and, in case of failure to agree upon the mode and terms of interference, not to interfere with their operations or usefulness beyond the actual necessities of the case, due regard being given to the other public interest involved. (Laws 1927, ch. 45, Sec. 310, p. 315; C. S. 1929, Sec. 30-310.)

Sec. 77-2722 makes it a misdemeanor to construct any works in a manner harmful to the district or to any watercourse therein, and in a manner contrary to that specified by the board, and provides that the board may make regulations for and may prescribe the manner of building bridges, roads, highways or fences or other works in, into, along or across any channel, natural or artificial watercourse. This statute, 77-2722 also provides for legal relief against persons or "public corporations" wilfully failing to comply with the regulations of the board. A public corporation is one created by the state for political purposes and to act as an agency in the administration of civil government generally within a particular territory or subdivision of the state, such as a county, city, town or school district. Black's Law Dictionary, Third Edition, p. 439. It is apparent, therefore, that a county or city could not condemn conservancy district property. However, when the highway has once been turned over to the state or been designated by the legislature as a state highway pursuant to Sec. [Illegible Word]-229, there is considerable doubt as to whether the conservancy district could condemn the state highway, as its eminent domain statute gives it a dominant right over private or public corporations only, and this does not include the state. We doubt if the legislature intended the conservancy board to have the right of eminent domain over all state property, and if so, it would probably be delegating duties placed solely within its jurisdiction by the Constitution. We question whether the conservancy district could condemn the State Capitol Building.

In view of Sec. 14, Article V, Constitution of New Mexico, providing for a permanent highway commission, consistent constitutional interpretation requires the regulatory powers of the Conservancy Board as to public highways be considered limited and: subordinate to those of the Highway Commission. The amendment Sec. 14, Ar. V provides that the State Highway Commission is empowered and charged with the duty of determining all matters of policy relating to state highways and public roads and

"It shall have general charge and supervision of all the highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have complete

charge of all matters pertaining to the expenditure of state funds for the construction, improvement and maintenance of public roads and bridges."

My attention has been called to Regulation No. 3 of the Middle Rio Grande Conservancy District adopted on January [Illegible Word], 1947, which requires all persons, firms or corporations before constructing any bridge, road, highway fence or culvert over or along any ditch or canal of the district to submit all plans thereof to the Conservancy District Engineer and obtain his approval and his permission for the construction. I doubt if this was ever intended to apply to State Highway contracts. I see no reason, however, why the Conservancy District Engineer should not be consulted in this matter, but it is now clear under Article V, Sec. 14 of the Constitution that the Conservancy Engineer must submit his plans for approval of the State Highway Commission before he starts construction or alteration of conservancy district improvements upon a highway right-of-way.

It would seem that there would be few instances where the interests of both the Highway Commission and the Irrigation and Drainage District are not identical, but if such cases arise and unless the rights of the United States are involved in the matter, we feel that as to the last four named organizations, although the Highway Commission could designate the reasonable location and the construction commensurate with the safety of the traveling public in the right-of-way, it could not require the removal of the ditches from the rights-of-way without further legislative authority.

RIGHTS OF THE UNITED STATES. The power of eminent domain may be exercised by the Federal government in furtherance of the powers conferred upon it by the Constitution, and it may condemn property within the states generally for this purpose (20 CJS, Sec. 18, pp. [Illegible words]. The Secretary of Interlor is authorized to acquire lands by condemnation through the Attorney General (43, USCA 421), and this power is not subject to control by the state nor its exercise required to conform to state procedure. The decision of the Secretary as to the matter of necessity for the taking is conclusive. United States v. O'Neill (D. C. Col. 1912) 198 Fed. 677.

It appears, therefore that in each case the ownership of the ditch must be determined before any action can be safely taken by the Commission, and that in acquiring new rights-of-way the possibility of necessity for ditches therein should be taken into consideration.

As stated before, this opinion is a broad generalization. Effective research can only be done on each problem when full knowledge of the facts and circumstances is at hand. Such research might well disclose inaccuracies in and exceptions to some of the matter herein set forth. We trust, however, that the general discussion will be of some assistance to the Department.