Opinion No. 54-5884

January 4, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Vincent M. Vesely Assistant District Attorney Silver City, New Mexico

*{*317}* The question in your letter of December 12, 1953, stated briefly, seems to be: Has the Board of County Commissioners of Grant County authority to grant an easement for a private telephone line within the right of way of a county road?

Sections 72-102 and 72-103, N.M.S.A., 1941, are authority for certain public utilities to place poles and wires in the right of way not within incorporated municipalities, subject to the approval and permit of the County Commissioners. Section 58-301, N.M.S.A., 1941, gives the County Commissioners general control and management over roads and highways in their respective counties, with the exception of state highways and bridges constructed and maintained with state aid.

Section 58-307(c), N.M.S.A., 1941, however, provides that the Highway Commission shall prescribe rules and regulations and conditions under which telephone lines, etc., may be placed along **public highways** in this state. By Section 58-714, N.M S.A., 1941, the legislature prescribed certain requirements for the construction of such lines. This latter section did not purport to grant any rights to utilities nor was it a source of regulatory powers of the Highway Commission. See Attorney General's Opinion No. 5624 at Page 7, dated December 31, 1952.

In 1949 the people amended the constitution, however, and established a permanent Highway Commission "empowered and charged with the duty of determining all matters of policy relating to state highways and **public roads."** If there was any confusion as to the source of authority for granting easements to public utilities across county roads prior to the adoption of this amendment, it would seem to have been settled by the adoption of the amendment.

We are informed that the Highway Commission has, as a matter of practice, issued permits upon county roads as well as upon state highways to public utilities, although it usually follows the County Commissioners' desires in these matters. Its present policy, we are informed, is to request that the application be made through the county upon forms furnished by the Commission which would be signed by both the County Commissioners and the applicant.

The more difficult question, perhaps, is whether any permit could be granted a private telephone line or utility over the property dedicated to a public purpose and further still if a private line is connected with a public utility, is that portion used privately a sufficient part of the public utility to endow it with public characteristics.

It would appear that a public highway, even though acquired only by virtue of the one year limitation statute, 58-105, N.M.S.A., 1941, should be used only for public purposes. The state is only authorized to take private property for such purposes and even though the statute purports to place the fee thereof in the State of New Mexico, such title would appear to be a conditional fee for public purposes only. See Attorney General's Opinion 4644, January 24, 1945, and Attorney General's Opinion 5624, Pages 4 to 6.

*{*318}* The general rule appears to be that the county cannot authorize the construction of a private telephone line along the highway. 52 Am. Jur,. Page 64, which cites Benton v. Yarborough, 123, S.E. 204, 34 ALR 402, and the annotation following on Page 405. We find no subsequent annotations or cases in point, and those cases cited in the annotation, with the possible exception of Newman v. Avondale, (1894) 31 Ohio L.J. 123, appeared to have been brought by the adjoining owners to restrain the construction of such private lines in the right of way in front of their property.

In view of the above, it occurs to us that if the line is strictly a private one that neither the county nor the state could consent to its erection on a public right of way. If, however, it is also devoted to a public use and the county authorized its erection, the State Highway Commission might grant it a permit. It occurs to us that even though the Mangus Cattle Company might desire a private line in view of the confidential nature of its communications, nevertheless it would no doubt grant the public the use of its line in case of an emergency and might even consent to the stringing of additional lines on its poles for public use if placed in the right of way. Such benefits to the public might be sufficient to characterize it as being devoted to public use and yet not require its qualifying with the Corporation Commission as a public utility.

The question of its benefit to the public could well be determined by the County Commissioners and the Highway Commission, and no doubt the courts would be bound by their determination of the matter. Perhaps, however, an adjoining owner might recover additional damages because of the imposition of this additional servitude in the right of way under the doctrine of Summerford v. Board of County Commissioners, 35 N.M. 374. On a country road, however, such damages probably would be nominal.

We trust that the above answers the general question and that the principles indicated can be satisfactorily applied to your specific case.

By: John T. Watson

Special Assistant Attorney General

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