

Opinion No. 62-127

October 15, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General J.E. Gallegos, Assistant Attorney General

TO: Robert H. Sprecher, Assistant District Attorney, Roswell, New Mexico

QUESTION

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What action can the Board of County Commissioners take on a petition to vacate rights-of-way expressed in patents from the United States to private landowners?

CONCLUSION

See Analysis.

OPINION

ANALYSIS

It appears that each of five persons received patents from the federal government in 1961 to certain small lots in Chaves County, New Mexico. The patents issued pursuant to the Congressional Act of June 1, 1938 (52 Stat. 609; 43 U.S.C.A. 682 (a)) authorizing the Secretary of the Interior to lease or sell public lands in lots not exceeding five acres for a home, cabin or business site.

The patents contained the conventional reservations to the United States for ditches or canals and for right-of-way for federal aid highway. In addition, they contain a clause which reads as follows:

"This patent is subject to a right-of-way not exceeding 33 feet in width for roadway and public utilities purposes, to be located . . ." (description follows)

This clause apparently results from regulations of the Secretary of the Interior made in implementation of the Act of June 1, 1938. See 43 C.F.R. § 257.16 (c) revised May 29, 1959, 43 C.F.R. § 257.17 (b) pocket supplement.

We are informed that it is a fact that the rights-of-way in question have never been subject to public use nor has possession of them been taken by an affirmative act of the public authorities.

The five landowners have petitioned the Board of County Commissioners of Chaves County to "vacate" the rights-of-way. Thus, the question with which we are truly concerned is what action can the Commission take on the petition.

Interesting problems are apparent as to what rights are created by the subject clause. But those problems are of no concern to the Board of County Commissioners. For the statement of their authority to vacate a road is expressed in Section 55-4-4, N.M.S.A., 1953 Compilation, as follows:

"Whenever, in the opinion of the board of county commissioners of any county, **any road or part of road then established and maintained as a public highway**, is not needed, or the repairs of the same are burdensome and in excess of the benefits therefrom . . ." (emphasis supplied)

The power to vacate clearly encompasses only "established and maintained" roads. See Attorney General Opinion 58-87. The roadways in question exist only on paper. They are not established and, of course, they are not maintained, so the Board of County Commissioners has no power to vacate them and any attempt to do so would be a nullity.

It may be that the reservations in the patents in fact constitute dedications to the public authorities, 6 **Thompson on Real Property** § 3485; 16 Am. Jur. "Deeds" § 302, and that at present these dedications stand unaccepted. See, **Lovelace v. Hightower** 50 N.M. 50, 168 P.2d 864; **Hamerly v. Denton**, Alas. 1961, 359 P.2d 121. However, the petition to vacate can in no way be viewed as requiring the Commissioners to inquire into the relative rights of the parties, to act prospectively, nor to use the power to vacate as a tool to quiet title for private parties.

We conclude that the Chaves County Board of Commissioners should deny the petition in question for the reasons previously stated.