

**Opinion No. 88-59**

September 21, 1988

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** E. Maine Shafer, Jr., Assistant Attorney General

**TO:** Honorable Gary K. King, New Mexico Representative, District 50, P.O. Box 117, Moriarty, NM 87035

**QUESTIONS**

1. May county commissioners declare section lines public highways?
2. Are there any restrictions or limitations on such authority?

**CONCLUSIONS**

1. Yes.
2. Yes.

**ANALYSIS**

Section 67-5-1 NMSA 1978 empowers county commissions to declare section lines<sup>1</sup> public highways:

County bridges are parts of public highways and must not be less than sixteen feet in width; when practicable the county commissioners shall declare all township and section lines, public highways of not less than forty feet in width, and where there is no improvement, no compensation shall be paid for such highways. (emphasis added).

However, in *Frank A. Hubbell Co. v. Gutierrez*, 37 N.M. 309, 22 P.2d 225 (1933), the New Mexico Supreme Court placed two restrictions on that power.<sup>2</sup> First, the court concluded that, "[w]hatever may have been the legislative theory,... as to lands privately owned when the declaration is made, [the section] is a nullity." *Id.* 37 N.M. at 311, 22 P.2d at 226. Thus, notwithstanding Section 67-5-1's language that county commissioners "shall" declare township and section lines as public highways, commissioners have no power to take private property along section lines for highways without compensation. *Id.* Article II, Section 20 of the New Mexico Constitution and the Fifth Amendment of the United States Constitution require governmental entities to provide just compensation when they take private property for public use. See 1912-13 *Atty. Gen. Op.* 155.

Second, the Court ruled in *Frank A. Hubbell Co.*, that, when a county commission declares a section line a public highway, it must follow the "ordinary statutory procedure for the establishment of highways." 37 N.M. at 310, 22 P.2d 225. Section therefore is not "self-executing". 1912-13 Atty. Gen. Op. 176. Sections 67-4-1 through 67-4-24, NMSA 1978 set forth the procedure for establishing highways. Where taking of private property is involved, a commission also must comply with the Eminent Domain Code, Sections 42A-1-1 through 42A-1-33 NMSA 1978.

We therefore conclude that, although Section 67-5-1 NMSA 1978 authorizes county commissioners to declare township and section lines public highways, they must provide compensation for any private property taken and comply with the ordinary statutory procedures for the establishing county roads.

### **ATTORNEY GENERAL**

HAL STRATTON Attorney General

### **GENERAL FOOTNOTES**

[n1](#) A "section line" is the boundary of a "section", a square tract of one square mile, or 640 acres. Each "township," six square miles, is divided by straight lines into thirty-six sections. See *Otero v. Sandoval*, 60 N.M. 444, 447, 292 P.2d 319, 321 (1956).

[n2](#) The Court was interpreting the predecessor statute to Section 67-5-1.