

## Opinion No. 17-2018

July 13, 1917

**BY:** HARRY L. PATTON, Attorney General

**TO:** Mr. D. W. Jones, County Highway Superintendent, For Guadalupe, De Baca, Curry and Roosevelt Counties, Portales, New Mexico.

The Fort Sumner-Santa Rosa-Las Vegas Road Is a Public Road Which Cannot Be Obstructed.

### OPINION

I have your recent letter in which you say that prior to the Civil War the United States Government laid out a road from Fort Sumner to Santa Rosa and thence to Las Vegas. You say that this road runs from Fort Sumner in a general northwest direction without reference whatever to section or township lines. You say that this road was opened and recognized and maintained by the authorities of Guadalupe County until quite recently, but that recently several tracts of land have been filed on by settlers who have built fences across this road without providing gates, and thus forcing the public to detour their particular tracts of land. You say that the Board of County Commissioners of Guadalupe County wish to preserve and maintain the original road as laid out by the government and ask advice as to what power, if any, they have to force this road open and what proceedings are necessary.

Section 2626, Codification of 1915, reads as follows:

"All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways."

You may see that the roads declared to be public highways are not confined to the roads established by the laws of the State or Territory, but extend to roads dedicated to public use, and that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporated authorities of any county.

The township plats on file in the office of the Surveyor General of this district, show this road. On some of the plats it is designated as the "Fort Sumner Road" and on others as the "Fort Sumner and Las Vegas Road." The survey of those townships was made by the United States Government in the last century in the late sixties and early seventies and the plats were made from such survey. This indicates that the road was established prior to the date of the survey. From information available, the road was a post or military road connecting Fort Sumner and Fort Marcy by way of Las Vegas, -- as a matter of fact, by way of Puerto de Luna. My information is to the effect that there was

no town of Santa Rosa at the time this road was established. Notwithstanding the fact that Fort Sumner was abandoned as a military post about 1860, the road has at all times since been recognized and maintained by the public authorities.

As to the question of right of way of public roads over lands belonging to the United States Government, will say that Section 2477, United States Revised Statutes, reads as follows:

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

Section 2628, Codification of 1915, reads as follows:

"Whereas the Congress of the United States has declared all post roads and roads over which mails of the United States are carried to be public roads, it is therefore likewise declared by this section that all such roads are and shall continue to be public roads and open to the people of this State."

From these facts, coupled with the law cited, I am of the opinion that the United States Government established and dedicated this road; that the same was authorized under the provisions of the act of Congress referred to; that the road has been recognized and maintained by the authorities of Guadalupe County; and that the same is a public highway.

Section 2698, Codification of 1915, reads as follows:

"It shall hereafter be unlawful for any person or persons to in any manner obstruct any public road in this state, by putting therein or thereon any obstruction whatsoever, and all persons convicted of a violation of this section shall upon conviction before any court of competent jurisdiction be fined in any sum not to exceed fifty dollars (\$ 50.00) or be imprisoned in the county jail for a period not to exceed thirty days, and pay all the costs of prosecution, or both such fine and imprisonment at the discretion of the court trying the cause."

I am of the opinion that the provisions of Section 2698 are in full force and effect and suggest that persons who have obstructed this road with fences should be given an opportunity to remove the same. Upon their failure to do so, I recommend that they be prosecuted.

Also Section 2691 relates to obstruction of highways and the duty of Justices of the Peace to prevent the same. Section 2696 imposes a fine upon the Justice of the Peace who shall neglect to comply with the duties imposed in Section 2691. Section 2697 makes it the duty of the County Commissioners to see that Justices of the Peace comply with the requirements of said sections, but Sections 2696 and 2697 were repealed by Chapter 100, Laws of 1917.

I refer you to Section 5, Chapter 75, Laws of 1915, which authorizes every lessee and every purchaser of State lands holding the same under contract to purchase, to fence said lands and erect and maintain gates and run-ways at all intersections at public highways.

I am of the opinion, however, that the right to place gates at the intersection of public highways is limited to the lessee or purchaser of state lands.