

Opinion No. 22-3454

May 29, 1922

BY: HARRY S. BOWMAN, Attorney General

TO: Honorable L. A. Gillett, State Highway Engineer, Santa Fe, New Mexico.

Rights of Way Across State Lands for Road Purposes.

OPINION

{*158} Referring to our conversation this morning, relative to the question of the obtaining of rights of way over state lands for purposes of state highways, I wish to advise you as follows:

You informed me that a state highway is being constructed in Lea County, a part of which crosses certain lands owned by the state, the road passing along the section lines of said lands, and the question has arisen as to the laws relative to the acquiring by the Highway Commission of rights of way for the purposes of such highways.

I am of the opinion that the right of eminent domain to condemn lands of this character is not within the powers of any state agency. In fact, the lands owned by the state are not subject to condemnation by any agency of the state for a public purpose.

I am satisfied, however, that it is not necessary to condemn such lands for highway purposes, as Congress, in 1866, passed a law which granted a right of way for the construction of highways over public lands not reserved for public uses. (R.S., Sec. 2477, U. S. Comp. Stats. 1916, Sec. 4919.)

When the lands in question were granted to the territory in 1898 and to the state in 1910, they were already impressed with the easement for rights of way as granted by Congress upon public lands, and, therefore, no question could arise as to the propriety of the state to grant rights of way over public lands which it received from the federal government without any compensation therefor, unless there should be some statute which requires payment for such an easement.

Section 5231, Code 1915, provides as follows:

"The Commissioner may grant rights of way and easements over, upon or across state lands for public highways, roads, tramways, telegraph, telephone and power lines, irrigation works, mining, logging and other purposes, upon payment by the grantee or grantees of the price fixed by the Commissioner, which shall not be less than the minimum price for the lands, used, as fixed by law."

At first blush, it would appear as if this section requires the payment of an amount equal to the value of the land for a right of way for public highways constructed by the state.

It is undoubtedly correct that public highways constructed over state lands by any other agency than the state, must be at the expense of the constructing agency, in so far as the payment for the right of way is concerned.

I am satisfied, however, that there is no requirement that the state itself should pay to itself any sum whatsoever for a right of way for a public highway constructed by itself for the use of itself.

It has been uniformly held that requirements of law relative to the payment for the use of state property are held not to apply to the state itself or its agencies when engaged in the services of the state.

For the foregoing reasons, I am of the opinion that the Commissioner of Public Lands may grant to the State Highway Department a right of way over state lands for state highway construction purposes without violating any of the provisions of the Enabling Act {*159} or without receiving in consideration therefor any compensation for such rights of way.