

## Opinion No. 31-244

August 20, 1931

**BY:** Frank H. Patton, Asst. Attorney General

**TO:** Mr. J. F. Hinkle, Commissioner of Public Lands, Santa Fe, New Mexico.

{\*98} By your letter of August 19th, you wish to know if the Commissioner of Public Lands, by virtue of Section 132-154 of the New Mexico Statutes, Annotated, 1929 Compilation, has the authority to include a 44-acre tract in the right-of-way of a railroad company for stock-holding pen purposes and fix the price therefor and execute a deed of grant without advertising and offering the same for sale at public auction.

Under date of February 18th, of this year, Mr. Neumann, the Attorney General, rendered an opinion to Mr. W. C. Davidson, then State Highway Engineer, in which he held that the State Land Commissioner might, in his discretion, give to the Highway Department a right-of-way, for State Highway purposes, over state lands.

The Attorney General held that the word "may", in the section above quoted, was a permissive word rather than a directory one, for the reason that the Land Commissioner was clothed with absolute power over state lands, except in such cases where he was expressly guided and directed by statute, and that such matters were, no doubt, entirely within his discretion.

This opinion was evidently written in view of the holding of the Supreme Court of this State in *Otto vs. Field*, 31 N.M. 120.

Article 13, Section 1 of the State Constitution provides that all lands belonging to the territory of New Mexico and all lands granted, transferred or confirmed and all lands hereafter acquired are declared to be public lands of the state to be held or disposed of as may be provided by law for the purpose for which they have been or may be granted, donated or otherwise acquired.

We have, therefore, a provision of law which provides that the Commissioner may grant rights-of-way and easements and therefore we see no conflict between this section and the constitutional provision, and we see no reason to disagree with the opinion above mentioned heretofore rendered by this office.

It is our belief, therefore, that the Commissioner of Public Lands may grant the right-of-way mentioned in the said letter and execute a deed therefor without the necessity of advertising and offering the same at public auction.