

Opinion No. 31-64

February 18, 1931

BY: E. K. Neumann, Attorney General

TO: Hon. W. C. Davidson, State Highway Engineer, Santa Fe, New Mexico.

{*46} Your query of February 13, 1931 is as follows:

"Is it legal for the State Land Commissioner to issue deeds for right of way to the State Highway Department for right of way for highway purposes thru state land, said right of way to be 400 feet in width?"

Section 132-154 is as follows:

"The commissioner may grant rights of way and easement over, upon or across state lands for public highways, railroads, train ways, telegraph, telephone and power lines, irrigation works, mining, logging and for 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 lands, used, as fixed by law."

In the first place, I doubt that it was intended that the state should pay for rights of way over state lands for state highway purposes, agreeing with the conclusion reached thereon by Mr. Bowman when he was Attorney General, in that it has been uniformly held that where a law requires payment for the use of state property its provisions do not apply to the state or any of its departments when engaged in state service.

The word "may" in the Section quoted, in my opinion, is a permission word rather than one directory, for reason that the Land Commissioner is clothed with absolute power over state lands, except in such cases where he is expressly guided and directed by statute, and such matters no doubt are entirely within his discretion. Such evidently is the holding of our Supreme Court in *Otto vs. Field* 31 N.M. 120.

Therefore, I feel sure that the Land Commissioner may, in his discretion, give to the Highway Department a right of way for a state highway over state lands. The width is immaterial, if in his discretion, a public interest would be effectively served by the giving of a right of way 400 feet in width.