

Opinion No. 33-681

November 9, 1933

BY: E. K. NEUMANN, Attorney General

TO: Hon. G. D. Macy, State Highway Engineer, Santa Fe, New Mexico. Attention: Bert R. Thomas, Office Engineer.

{*89} This has reference to your letter of November 4, 1933, relative to the proposed removal of certain poles of the Inland Utilities Company from the state highway through the unincorporated Town of Grants, New Mexico.

From the facts, as I understand them, this highway has been used as {*90} a state highway and has been so designated for a long period of time, at least prior to 1917. In 1917 a purported dedication was made of this highway, along with other streets and alleys, by the Bernalillo Mercantile Company, and in 1928 the County Commissioners of Valencia County granted a right-of-way over this highway to the Inland Utilities Company for the purpose of operating a power line. The question now arises as to whether or not the State Highway Commission can compel said company to remove its poles from the highway at its own expense.

The principal question, to my mind, is, what was the exact width of the right-of-way acquired by the public for use as a state highway. This is a question of fact to be determined by such evidence as might have a proper bearing on the matter. Assuming, however, that the public acquired a fifty foot right-of-way, this right was acquired prior to the aforementioned dedication and the County Commissioners, in my opinion, would have no right to grant any easement to the Inland Utilities Company over said highway. See Section 64-330, 1929 Code. Whatever right-of-way the public acquired since 1917 would also, in my opinion, be under the control and management of the State Highway Commission under the provisions of the section above cited. Therefore, it would follow that the Inland Utilities Company acquired no easement by virtue of the attempted grant from the County Commissioners and could now be compelled to remove its poles.

I have examined the purported dedication from the Bernalillo Mercantile Company and in my opinion it does not comply with Section 90-222, 1929 Code. However, considering the views above expressed, this would probably have no bearing on the question.

It seems to me that the important point to be established is that the public acquired a **fifty foot** right-of-way. This can no doubt be done, but if it became necessary to start litigation it would prove troublesome and expensive. If the cost of removing these poles is not excessive, I would advise a compromise with the Inland Utilities Company whereby each party would share the expense of removing the poles.

By: QUINCY D. ADAMS,

Asst. Attorney General