

## Opinion No. 44-4553

July 26, 1944

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Richard F. Rowley, Acting District Attorney, Clovis, New Mexico

We are in receipt of your letter of July 22, 1944, in which you state that a petition has been presented to the Board of County Commissioners covering a road running 4 miles West and 6 miles South. Starting at the East end of the road, the first 3 miles have never been opened; however, the fourth mile of the road, which runs East and West has been opened for a number of years. Then the 6 miles which run North and South have never been opened.

In view of this situation, you ask our opinion as to whether or not such a road may be opened under Section 58-405 of the 1941 Compilation. This section is as follows:

"The board of county commissioners may alter, widen or change any established road or lay out any new road in their respective counties, when petitioned by ten (10) freeholders residing within two (2) miles of the road sought to be altered, widened, changed or laid out. Said petition shall set forth a description of the road sought to be altered, widened or changed, and if the petition be for a new road, it shall set forth the points where it is to terminate."

In *Evans v. West*, 138 Ind. 621, 38 N. E. 65, the Court had before it a similar question. There the Court said:

"It is contended that the proceedings before the board were void, for the reason that the petition asked for two improvements instead of one; that the work petitioned for and ordered done comprised 'the building of a gravel road, consisting of two separate parts, not contiguous, but which, when built, would be connected by an old pike road, which was in existence at the time the new road was ordered.'

\* \* \* The court knows that the line so described is a continuous line from the beginning to the end of the proposed gravel road. The fact that the work contemplated passes over and includes a part of a gravel road already constructed cannot of itself destroy the singleness of the work proposed to be done. If it crossed another gravel road, instead of intersecting a part of it lengthwise, no one would contend that two proposed improvements, instead of one, would thus be described. \* \* \* If the viewers found that in crossing or intersecting another improvement -- as a bridge, a railroad track, or another gravel road -- the improvement intersected ought to be so changed as to conform to the proposed work, that was a matter for them and the board to consider. If, on the contrary, they found the intersecting improvement to be already sufficient to conform to the work proposed, that, too, was for their consideration and that of the board. \* \* \* If the bridge, railroad crossing, old gravel road, or other intersecting part of the contemplated gravel

road does not need improvement, but is already of a grade and condition to become a part of the new work, we see no reason why such fact should make of the contemplated work two or more improvements, instead of one. The public convenience, to which the statute calls attention, will certainly be promoted by having the whole work done under one petition, and by one proceeding and contract. \* \* \*

In *Barry v. Deloughery*, 47 Neb. 354, 66 N. W. 410, the Court said:

"As to the objection that the proceedings referred to two roads, as these were both along section lines, joined one another, and formed a single scheme of highway improvement, there could be no objection to the procedure on this ground. Whether two disconnected roads can be opened by a single proceeding, we need not determine."

In *Stoddord v. Johnson*, 75 Ind. 20, the Indiana Statute provided in part as follows:

"Sec. 1. \* \* \* The board of commissioners of any county in this State shall have power, as hereinafter provided, to lay out, construct or improve, by straightening, grading, or draining in any direction required to reach the most convenient and sufficient outlet, paving, graveling, or macadamizing any state or county road, or any part of such road, within the limits of their respective counties."

There the Court said:

"We agree with counsel for the appellant, that the statute does not authorize the including of more than one improvement in a single petition, but if counsel mean, as they seem to, that only one highway, or parts of only one, may be included in a single improvement, we do not assent. If that construction of the law be adopted, then a gravel road, in a single proceeding, can not be constructed through a town or city except along a single street, for every street is a separate highway; and in the country each enterprise must end with the highway on which it is begun, though connecting with another highway leading in the direction of the desired improvement. The petition must state the points between which the improvement is asked; and we find in the law nothing which forbids a petition for an improvement, whether it be a single continuous line, or a line with branches, so long as all the parts are connected."

In view of these cases, it is my opinion that if a proposed road is continuous, even though it follows in part a previously existing road, that it may be considered "a new road" within the meaning of Section 58-405, and all be included in one petition.

However, your attention is directed to the fact that our Supreme Court has never passed upon this question; that in two of the cases above cited the exact language of the statute is not set out; and that in the third case the language of the statute, while similar, is not identical, so that a different conclusion could easily be reached under our statute.

Further, in your letter you suggest that possibly the inclusion of the four miles East and West may have been for the sole purpose of obtaining sufficient signatures to permit the

construction of the North and South part of the road. You also suggest that, as a matter of fact, the East and West part of the road, and the North and South part of the road may be two separate roads. I, of course, am not in a position to pass upon any question of fact. It appears to me that this would be the obligation of either you or the County Commissioners.

Trusting that the foregoing may be of some assistance to you, I am

By ROBERT W. WARD,

Asst. Atty. General