

Right-of-Way—Condemnation—Federal Highways—Highways—Petitions—Counties.

The county has no authority to bring condemnation proceedings to obtain right-of-way for a federal road, but when a petition is properly presented may establish a county road and institute condemnation proceedings for the purpose of obtaining right-of-way therefor.

Mr. Horace W. Judson,
County Attorney,
Cut Bank, Montana.

August 1, 1932.

My dear Mr. Judson:

You have requested an opinion on the question of whether the county can condemn land for right-of-way for a federal highway, or whether such action should be brought by the state highway commission.

In the case of *State ex rel. McMaster, et al vs. District Court*, 80 Mont. 228 it is held that the right to take private property from its owner against his will can only be invoked pursuant to law; authority for the exercise of such right must be clearly expressed in the law before it will be allowed, and when the right is sought to be exercised the provisions of the law must be rigorously complied with. It was also held that Montana has no statutory provision authorizing a board of county commissioners to procure a right-of-way for a state highway by condemnation proceedings after such highway has been approved, laid out and established by the state highway commission.

I further find no statutory provision authorizing either the board of county commissioners or the state highway commission to procure a right-of-way for a federal highway by condemnation proceedings. However, it is to be noted that in the *McMaster* case, *supra*, the board of county commissioners attempted to establish a right-of-way by resolu-

tion only and that no petition asking for the establishment of the same was ever filed with the board.

In this particular case a petition has been filed, signed by the required number of freeholders and taxpayers of road district number 2 of Glacier county, petitioning the county commissioners to lay out and establish a county road. It would therefore appear that as far as the proceedings now show the county commissioners have jurisdiction by reason of said petition to establish such right-of-way as the county road and to institute condemnation proceedings for the purpose of obtaining the same.

After such right-of-way is established and obtained as a county road I find no statutory authority authorizing the conveying of the same to the federal government for a federal highway. This is a question, however, that I do not believe could be raised in the condemnation proceedings as the proceedings will show that the right-of-way is being requested in conformity and for the purpose set forth in the petition.

It is therefore my opinion that inasmuch as the county commissioners have secured jurisdiction by virtue of the petition which has been filed as provided by statute, that they may institute proceedings to condemn the necessary right-of-way and that whether the federal government will thereafter proceed to maintain the same as a federal highway without a conveyance thereof from the county is a matter which rests solely with the federal authorities.

Very truly yours,

L. A. FOOT,
Attorney General.