

**County Commissioners, Powers of Over Roads. Roads,
Powers of County Commissioners Over.**

Boards of County Commissioners are dependent upon the terms of the petition when laying out, altering or abandoning roads, and cannot abandon an established road upon a petition for a new one, no part of the old road being within the limits made by the termini of the new road.

October 22, 1914.

Hon. Charles J. Marshall,
County Attorney,
Lewistown, Montana.

Dear Sir:

I am in receipt of your communication under date the 12th ultimo, requesting my opinion in regard to certain proceedings had by the

Board of County Commissioners of your county in the establishment and abandonment of certain roads. It seems that two petitions were circulated and filed on the same date, one of them requesting a change in an established road in District No. 8, which change would make a road described about as follows:

"Beginning with the quarter corner on the south side of Sec. 10, Twp. 14 N., R. 17 E., and ending at the northeast corner of the southeast quarter of the southwest quarter of Section 11 in said township;"

the other for a new road:

"Commencing at the center of the southeast quarter of Sec. 15, aforesaid, and running thence in a northwesterly direction to the northwest corner of Sec. 10, to intersect the county road running to Glengary."

One Smith, a signer of both of these petitions, put in his petition as charges and damages for the right of way, the following:

"County to put in two stock culverts, one in Sec. 10, and one in Sec. 15, and allow said E. S. Smith to fence his land on the south and east now occupied by county road and also his land on the west of the southwest quarter of Sec. 10, and to do what more is necessary on now changed road."

This requirement appeared in the petition for the new road. Under the same head on the petition for a change of road, was the following language:

"Compensation charged in petition for new road through Sec. 15 and 10, Twp. 14 N. R. 17 E."

As nearly as I can determine from the record before me, and your letter, the board by an order made at a special meeting held the 11th and 15th of July, 1914, established the new road; and by the same order authorized Smith to fence up that portion of the established highway which he had noted as his charge and damages for right of way; and by the same order, the commission abandoned said portion of the old county road lying adjacent north and west of the line on which Smith was allowed to place his fence.

The sections of Chapter 72 of the Laws of 1913, which govern the question at hand, to-wit: the power of the Board of County Commissioners to make changes in roads, are as follows:

Section 5, Chapter 1, in part as follows:

"All public highways once established, must continue to be public highways until abandoned by operation of law, or by judgment of a court of competent jurisdiction, or by order of the Board of County Commissioners of the county in which they are situate; but no order to abandon any main highway shall be valid unless preceded by due notice and hearing as provided in this act."

Section 2, Chap. 3, Subdiv. 4:

"The Board of County Commissioners * * * must 4. Abolish or abandon in the manner provided in this act, such highways as are not necessary for the public convenience."

Chap. 4, Sec. 1:

"Any ten or a majority of the freeholders of a road district, taxable therein for road purposes, may petition in writing, the Board of County Commissioners, to, establish, change or discontinue any common highway therein."

Sec. 2. "The petition must set forth and describe particularly the highways to be abandoned, discontinued, altered or constructed * * *"

A consideration of the above quoted portions of the highway law show that the petition is the foundation of the jurisdiction of the Board of County Commissioners to act, whether establishing a new road, changing an old one, or abandoning the same. The Board may act upon the matters included within the petition and further they cannot go. Any act or order of the Commissioners in excess of the terms of the petition, or the matters set forth therein, or necessarily implied by the petition, are void for want of jurisdiction. As a consequence, I am of the opinion that the order of the Board of County Commissioners allowing Smith to fence up that portion of the right of way of the established road crossing his land, and abandoning the remainder, is invalid, and for the following reasons:

The petition upon which they acted, to-wit: that for a new road, involved no portion of the old road, which was fenced and abandoned; no part of the established highway so fenced and abandoned was within the limits determined by the termini of the new road. In fact the petition for a new road in no way affected that portion of the old road abandoned, but was entirely in regard to a different subject. This is not a case where an old road would be abandoned ipso facto by the establishment of a different route of the same road, as is held to occur in some cases; that question is not involved.

The contention of Smith that his co-signers on the two petitions are bound by the conditions which he placed in the petition, as charges for right of way and damages, is untenable. This stipulation was a matter between him and the county commissioners, and not a contract between his co-signers and himself.

You are, therefore, advised that the action of the Board of County Commissioners in abandoning a portion of an established highway and allowing the same to be fenced when acting upon a petition for an entirely new road, not involving any portion of the highway abandoned was invalid, for want of jurisdiction to make such an order. As to the remedy to be applied, I will say that this is largely a matter of the present status of the case, and I do not feel that I have sufficient information to advise exactly the particular remedy to be sought. However, I will say that both injunction and certiorari in such cases as this are proper, the choice being determined by the status of the particular case.

Yours very truly,

D. M. KELLY,
Attorney General.