

**Public Highway, Damages. Opening Roads. Damages,
Right To. Road, Damages for Opening.**

1. Any land owner is entitled to recover from the county such damages as he may sustain by reason of the opening of a road through his land, whether the same is upon section or subdivision lines or extends diagonally across his land.

2. Where a desert entryman claims damages by reason of the opening of a road through his claim, the county cannot refuse to pay damages on the ground that the entryman has not complied with the law of the United States with reference to his claim.

3. A person to be entitled to damages by reason of the opening of a road through land claimed by him must have either legal or equitable title or right to the land.

Helena, Montana, March 11, 1908.

Hon. John A. Matthews,
County Attorney,
Townsend, Montana.

Dear Sir:—

I am in receipt of your favor of the 5th inst., in which you submit for the consideration of this office certain propositions which may be stated as follows:

1. "Is a non-consenting land owner entitled to damages

where a public road is laid out on a section line through his land?"

2. "Is the cost of constructing fence made necessary by the laying out and opening of a public highway a proper item to be considered in estimating damages?"

3. "Can the county legally refuse to pay damages on the ground that the claimant of land under a desert entry has not complied with the United States Law relative to his desert claim?"

There is no difference between opening a highway on a section line and elsewhere in so far as estimating damages is concerned.

Section 73 of Chap. XLIV Laws 1903, provides that:

"Highways must be laid out and opened, when practical, upon subdivision or section lines" but this section does not prohibit the laying out of a road on diagonal lines when necessary.

By Section 63 of this chapter the rule for ascertaining damages is stated to be the difference between the actual damages sustained and the actual benefits accruing from the opening of the road. This rule applies indiscriminately to all cases without regard to location of the road with reference to section and subdivision lines. The cost of erecting fence made necessary by the opening of the road is a proper item to be considered in estimating the damages.

The county has no authority to determine whether or not a desert entryman is entitled to receive patent from the United States Government for the lands so entered by him.

In *Van Vranken vs. Granite County*, 35 Mont. 427, the Supreme Court in considering a question similar to this, said:

"We are of the opinion that possession under an equitable title is sufficient to support an action."

If, therefore the party has actually made a filing under the laws of the United States and is in possession of the land, he would have a prima facie case. But this does not, of course, compel the county to award damages to every man who may claim that he is the owner of land, and if the county determines that he has no title, either legal or equitable, then it may refuse to award him any damages and force him into court to establish his claims. But all these matters, as you are aware, are questions of fact, and their determination must lodge largely in the good judgment and discretion of the board of county commissioners.

Very truly yours,

ALBERT J. GALEN,

Attorney General.