Public Highway, Over State Lands. State Lands, Easement Over for Public Highway. Public Highway, Change of Location of on State Lands.

Boards of county commissioners, when desirous of obtaining right of way over state lands for public highway, must file with the board of land commissioners a duly attested plat, showing the location of the proposed road, showing the necessity of the road and that it conforms as closely as possible with sectional and subdivision lines. When the statute is complied with, the board of land commissioners must grant the right of way.

Where a well defined permanent road-way, generally traveled by the public, existed over state lands prior to July 1, 1905, the public acquired an easement therein, under Section 2600, Political Code.

The supreme court has held, however, that the road must be permanent, well defined and fixed in its location. Chapter 44, Session Laws of 1903.

Chapter 44, session laws of 1903, re-enacts Section 2600, Political Code, and roads which were public highways at the time of the passage of the latter act are such without other or further action on the part of any one.

The state board of land commissioners may dispose of rights of way for public highways without receiving therefor the sum of $10.00 per acre, as required by the Enabling Act. An easement and not the fee is disposed of, and in the event of abandonment by the public the land reverts to the state, and Section 32, Chapter 147, Session Laws of 1909, is not in conflict with the Enabling Act.

Helena, Montana, February 9, 1910.

Hon. F. H. Ray,
Register,
Helena, Montana.

Dear Sir:—

I am in receipt of your letter of February 8, wherein you ask my opinion:

1. As to whether or not a county may acquire a valid right of way for a public highway over sections 16 and 36, except by means of formal application therefor made to the state board of land commissioners?

2. Would the fact that a road has been in use since 1871 or 1884 on sections 16 and 36 entitle the county commissioners to change the road to a new location in the same sections without formal application?

3. Can the state board, or any state official, dispose of state lands for right of way at less than $10.00 per acre?

In reply to your first question, I advise you that section 32, chapter 147, laws of 1909, provides the method of procedure which county commissioners should follow in establishing public roads over state lands. This section provides that a duly attested official plat, in duplicate, showing the location of the road, shall be filed with the board of land commissioners, together with a petition from the county or city officials showing the necessity for a road; that the road must be laid out, when physically practicable, along section and subdivision lines, and that a copy of the plat shall be filed in the state land office.

This section seems to deprive the state board of land commissioners of discretion in granting the right of way, when the preliminary steps required by the section referred to have been taken by the proper officers. This is now the only method by which a public highway may be established by a board of county commissioners over state lands. This section constitutes a legislative grant to the various counties of the state, upon certain conditions, and in view of the provisions contained in the preceding section, with reference to grants for like purposes to the United States government, and the provisions of the succeeding sections, with reference to grants of rights of way for public use, I am of opinion that neither you nor the board of land commissioners have any right or authority to charge for the land desired and taken in compliance with the conditions of said sections 32 for public highways.

Prior to the enactment of the law above referred to, the provisions of section 3503 of the political code (1895) must have been complied with. This section, 3503, was in force until the passage of chapter 147, session laws of 1909, the same section appearing in the revised codes as section 2190.

2. Section 2600, political code, (1905), provides that all public highways then existing, or used and traveled by the public, are highways. So that if a well established and traveled road extended over state lands prior to July 1, 1895, no further action on the part of the local authorities need be had toward obtaining a right of way from the state land board.

Chapter 44, session laws of 1903, known as the "Geiger Road Law," re-enacts section 2600 of the political code as section 1 of said Act. However, the supreme court, in construing this section has held that the road must have been permanent; that is, that where in open country the line of travel has from time to time digressed from the original road, either on account of weather conditions or otherwise, so that it is impossible to define the exact location of the road, that the easement of a right of way would not attach.

This condition, you will see, might easily arise in open prairie country or on account of the over-flow ofstreamsorheavyrains,makingthe
or on account of the overflow of streams or heavy rains, making the ordinary path of travel impracticable.

There is no provisions, either in the codes of 1895, or in chapter 44, laws of 1903, which authorizes a board of county commissioners to change

a road to any other part of sections owned by the state, without making the application called for by section 3503, political code, or section 2190, revised codes, or chapter 147, 1909, session laws. So that where a change of road is made, the application, as called for by section 32, chapter 147, laws of 1909, must now be complied with. And, further, the fact that a county may abandon an old road does not give it a similar easement over state lands unless the provisions of the section last above referred to are complied with.

3. I am of the opinion that section 11 of the Enabling Act, by placing a restriction upon the state to the extent that it may not dispose of the state lands at less than $10.00 per acre does not come in contravention with section 32, chapter 147, supra, for the reason:

First: That established public highways extending over state lands are usually of benefit to the lands and to the state, and the state does not convey title but merely an easement for the benefit of the public, is really the owner of the lands, and in the event of an abandonment of the public highway the title immediately reverts to the state without further action on the part of any one.

Then, again, if it were imperative upon the state board to receive at least the sum of $10.00 per acre for these rights of way, they could not be disposed of at all, under the provisions of section 32, but must necessarily, under other provisions of chapter 147, laws of 1909, be offered for sale at public auction and knocked down to the highest bidder.

You are, therefore, advised that section 32, chapter 147, session laws of 1909, is not violative of the provisions of the Enabling Act; and, as you have heretofore been advised, in the matter of granting rights of way for government irrigation projects and proposed rights of way for railroads, the land need not be offered at public auction, and in the matter of compensation for public roads the restriction of $10.00 an acre need not be considered.

Very truly yours,

ALBERT J. GALEN,

Attorney General.