

**Highways, Right of Condemnation Over Indian Allotment.  
Indian Allotment, Right to Condemn for Highways. Con-  
demnation of Highways, Over Indian Allotments.**

Where an Indian allotment is made under a statute or treaty which provides that the United States shall hold title in trust for a certain period, the provisions of the Act of March 3, 1901 govern, and such right must be obtained under such require-

ments as may be prescribed by the secretary of the interior and such right of way could not be procured through a condemnation proceeding.

May 4, 1911.

Hon. P. E. Allen,  
County Attorney,  
Red Lodge, Montana.

Dear Sir:

I am in receipt of your letter of the 22nd inst., wherein you ask my opinion as to whether Carbon county has the right to condemn a right of way over an Indian allotment within your county for the purpose of constructing a county road.

I presume, from the statements contained in your letter, that the Indian allotment in question is one to which a patent in fee has not, as yet, been issued by the government, but is one made in accordance with a statute or treaty wherein the United States holds the land in trust for a certain period.

Where an Indian allotment is made under a statute or treaty which provides that the United States shall hold the land in trust for a certain period, the land remains the property of the United States; the government retains the legal title, giving to the Indian a writing showing that at some future time he would be entitled to a regular patent conveying the fee. This being the case, the title to the land sought to be condemned by your county is in the United States government.

22 Cyc. 134.

U. S. v. Richert, 188 U. S. 432.

McKay v. Kalyton, 204 U. S., 466.

By the provisions of Section 7330 of the Revised Codes of 1907, eminent domain is defined to be "the right of the state to take private property for public use." This right may be exercised in the manner provided in this title." Then follows the different statutory provisions relating to the exercise of the right of eminent domain by the state.

It will be seen from the provisions of Section 7330: First, that the right relates to the taking of private property; second, that the right must be exercised only in the manner provided in the title. Without any statutory provision, then, for the exercise of the right with reference to the property of the United States, it is my opinion that your county could not condemn the right of way sought. However, the federal government by enactment has made provision for the acquiring of a right of way over lands such as described in your letter. By the provisions of the act of March 3, 1901, found in 31 statutes at large, p. 1083-84, Sec. 4, provides as follows:

"That the secretary of the interior is hereby authorized to grant permission upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways in accordance with the laws of the state or territory in which the lands are situated, through any Indian reservation or through

any lands which have been allotted in severalty to any individual Indians under any laws or treaties, and which have not been conveyed to the allottees with full power of alienation."

It is clear from the above provision that ample means have been provided for the acquiring of a right of way. The only procedure necessary on the part of your county being to take the matter up with the secretary of the interior and acquire the right of way in accordance with such reasonable requirements as he may deem necessary.

In your letter you call attention to the last paragraph of Section 3 of the Act of March 3, 1901, which provides:

"That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the state or territory where located, in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

31 Stats. at Large, 1083.

However, it is my opinion that this provision applies solely to allotments made in fee and has no application to allotments which have not been conveyed to the allottees with full power of alienation.

If, then, as stated above, the allotment in question has not been conveyed to the allottee with full power of alienation, Carbon county can only acquire a right of way in the manner prescribed by Section 4, above quoted.

If, however, the lands have been allotted in severalty with full power of alienation, then, by virtue of the provisions of Section 3, above quoted, the right of way may be condemned in the manner provided by Sections 7330 to 7335 inclusive, of the Revised Codes.

Yours very truly,

ALBERT J. GALEN,

Attorney General.