

Roads and Road Districts, Petitions for Roads. Powers of Boards of County Commissioners of New Counties, to Act Upon Petitions for Roads. Boards of County Commissioners, Power to Act Upon Petition for Roads.

A board of county commissioners of a new county would have no authority to act upon a petition for a highway which had been filed with the board of county commissioners of the old county, and merely transferred to the board of the new county. A new petition must be presented to the board of county commissioners of the new county for a highway.

March 19th, 1914.

Hon. Martin Flasted,
County Attorney,
Ekalaka, Montana.

Dear Sir:

I am in receipt of your communication under date of the 10th instant, submitting for my consideration the following question:

"Can commissioners of a new county act on road petitions which have been filed with the board of commissioners of the old county and then transferred to the board of commissioners of the new county?"

The provisions relating to the establishment of roads by boards of county commissioners are found in Chap. 4 of Chap. 72, Session Laws of the Thirteenth Legislative Assembly, Sec. 1 of which provides in part as follows:

"Any ten or majority of the freeholders of a road district, taxable therein for road purposes, may petition in writing the board of county commissioners to establish or discontinue any common highway therein."

This contemplates that the petition is to be filed with the board of county commissioners of the county within which the road district lies. Sec. 3 of Chap. 133 of the Session Laws of the Thirteenth Legislative Assembly, being the New Counties Act, provides in part as follows:

"The board of county commissioners shall divide the proposed new county into a convenient number of townships, road and school districts, and define their boundaries, and designate the names of such districts and each of them."

All of this to be done upon the determination of the question of area and taxable property contained in the new county and left in the old county. This provision contemplates a change in the boundaries of road districts to conform to the boundaries of the newly formed county, and such new districts formed by the commissioners of the old county within the limits of the new county might or might not include ten or a majority of the freeholders who had previously signed a petition for a road. Furthermore, the change in the location of a county seat brought about by the formation of a new county might do away with the necessity of a new road.

In such matters as the establishment of roads, the tribunal having power must base all its acts upon a clearly established jurisdiction, and jurisdiction in such matters is likewise limited by the statute giving power, unless jurisdiction can be found in the statute there is none. In the case in hand I find no provision providing for a transfer of a petition for a road from the old county to the new. The rule has been stated by one court to be:

"Commissioners of highways in laying out highways act under special statutory authority; and it must appear on the face of the proceedings, or by proof aliunde, that they acquired jurisdiction in the particular case; and a record purporting to be a record of a highway laid out by them, which fails to show affirmatively that jurisdiction was acquired, cannot be helped out by intendment or by presumption based upon the fact that the commissioners were public officers, acting in the discharge of a public duty."

Miller v. Brown, 56 N. Y. 383.

A similar analagous case is that arising where a portion of a county's territory is included within the limits of an incorporated town. It is usually held that the incorporation of the city or the inclusion of the territory within its corporate limits entirely divests the county officers of any authority over the highways within the corporate limits of the city or town.

For the reasons above stated, I am of the opinion that the board of county commissioners of a new county would have no authority to act upon a petition for a highway which had been filed with the board of county commissioners of the old county, and merely trans-

ferred to the board of the new county. I am further of the opinion that a new petition would be necessary before the board of county commissioners of the new county would have any authority to establish a highway.

Yours very truly,

D. M. KELLY,
Attorney General.