

**Road Warrants—Validity—Highways—Establishment of
—Petition—Order of County Commissioners—Districts.**

Where the County Commissioners order the establishment of a highway, the petition of the freeholders within the road district is not jurisdictional, and warrants issued by the Commissioners in payment of work on such roads are valid obligations of the county.

February 3, 1919.

Mr. Albert Anderson,
County Attorney,
Glendive, Montana.

Dear Sir:

It appears from your letter of January 30th, that the Board of County Commissioners of Dawson County are proceeding to issue bonds for the purpose of funding outstanding road warrants. It appears that several of the highways, for work upon which many of these road warrants were issued, were established upon petitions signed by free-

holders residing in more than one road district, and that such roads extend through more than one road district. The question is therefore presented as to the validity of the order establishing such roads and the warrants issued for work upon the same.

You state, however, that in the case of every road so established, either an easement has been acquired by or from the land owner, or the land owner has joined in the petition for the road and has agreed to let the county have the land in question for road purposes; and further that the roads which have been established have been traveled and used by the public and the road has, in every way, been regarded and used as a public highway.

Section 1 of Chapter 4 of the General Highway Law, Chapter 141 of the 1915 Session Laws, as amended by Chapter 172 of the 1917 Session Laws, provides that any ten of 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 a public highway therein. The following sections prescribe the procedure upon filing such petition. This section of the law has been substantially the same since 1895. See Section 2750 of the Political Code of 1895, Section 54 of Chapter 44 of the 1903 Session Laws, Section 1390 of the Revised Codes of 1907 and Section 1 of Chapter 4 of Chapter 72 of the 1913 Session Laws. It will be noted that in Section 2630 of the Political Code of 1895, Section 8 of Chapter 44 of the 1903 Session Laws, Section 1356 of the Revised Codes of 1907 and Section 2 of Chapter 3 of Chapter 72 of the 1913 Session Laws, the Board of County Commissioners must keep the county divided into suitable road districts. In the revision of the General Highway Law in 1915, this was changed by providing that the Board of County Commissioners must, *in their discretion*, keep the county divided into suitable road districts. In the amendment in 1917, the word "must" was changed to "may". It will therefore be noted that road districts have continually diminished in importance in the stated of page 64: "We have no doubt whatever that the Board of general scheme of highways in a county.

You will further note that the Board of County Commissioners have general supervision and control over the highways within the county. By Section 2894 of the Revised Codes, prescribing the general and permanent powers of the Board of County Commissioners it is provided in Paragraph 4 that the Board has jurisdiction and power to lay out, maintain, control and manage public highways. See also Chapter 3 of the General Highway Law granting general supervision over the highways to the Board of County Commissioners and imposing a mandatory duty upon the Board to cause to be surveyed, viewed, laid out and maintained such highways as are necessary for public convenience. In *Reid vs. Lincoln County* 46 Mont. 31, 125 Pac. 429 our Supreme Court County Commissioners has power *on its own initiative* to establish highways, bridges and ferries when necessary. The *only* limitation of this power has reference to the cost of the project."

In *Hardy vs. Keene* 54 N. H. 449, it appeared that a petition for a highway was double, in that it petitioned for two distinct and independent highways. It was held that this objection must be seasonably taken and may be waived and that if no objection was made and the same was referred to the Commissioners who lay out both highways petitioned for, the laying out of both said highways would be legal. In *Chelan County vs. Navarre* 38 Wash 684, 80 Pac. 845, it appeared that the petition asked for the establishment of more than one road and it was held that such petition did not render the proceedings void. The Court in this case said "Such a preceeding is doubtless irregular and it may be safer and better for the Commissioners to require that a separate petition be filed in each case; but such irregularity is not jurisdictional, and cannot be successfully urged to avoid the preceedings in a proceeding brought to condemn land for a right of way for the proposed road."

I do not believe that the petition for the establishment of a road under our highway act can be considered as jurisdictional, to the extent that the order of the County Commissioners establishing the highways in the cases presented by you would be considered as void or subject to collateral attack, after the road has been established, constructed and used generally by the public. In this connection see 37 Cyc. 75, *Banse vs. Town of Clark* 69 Minn. 53, 71 N. W. 819; *Stoddard vs. Johnson* 75 Ind. 20 and *Elliott on Roads and Streets*, Section 371, 382 and 383. In this last Section it is said that all objections not going to the jurisdiction will be deemed waived unless promptly made.

Furthermore, in the revision of the Highway Law in 1913, Section 20 was added to Chapter 4, which has been carried forward and now appears as Section 17 of the same Chapter in the 1917 amendment. This Section provides that none of the preceedings authorized by this Chapter shall be invalid by reason of any defect, informality or irregularity therein, which does not materially affect the interests of the county or prejudice the substantial rights of property owners immediately concerned. This section clearly indicates an intention upon the part of the Legislature that the petition in such an informal proceeding as the establishment of a highway should not be considered as jurisdictional. The county is certainly in no position to urge that the irregularity in the petition materially affects its interests, now that the highway has been established by its Board of County Commissioners and is in general use by the public. And it does not appear from your letter that the rights of any property owner have been prejudiced. I am therefore, of the opinion that the road warrants issued in payment of work upon these highways are valid and binding obligations of the county.

Respectfully,

S. C. FORD,

Attorney General.