

**Counties—Damages—Highways—Rights of Way—State Lands.**

Where a county seeks to build a highway across state land, which said highway does not follow the section line, the county is under no obligation to pay either for the land or for the damages, and that the only charge which can be made is for issuing the deed.

H. V. Bailey, Esq.,  
Register of State Lands,  
Helena, Montana.

My dear Mr. Bailey:

You have submitted to this office the application of the Board of County Commissioners of Judith Basin county for a right-of-way for public highway over the portion of the south part of Section 16, T. 15 N., R. 13 E.

The copy of the official plat filed with the application, as required by the statute, shows that this road does not follow the section line across the SE $\frac{1}{4}$  and the southeast corner of the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of this section, but it is also shown by the plat that the section line here crosses a hill or high ridge and that, by reason of that fact, it is impracticable to follow the section line with the proposed highway.

The plat further shows that the road right-of-way occupies 1.27 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$  and 3.64 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ .

The controversy that exists between your office and the Board of County Commissioners is over the payment for this land and damages to the section by reason of the fact that the road detours from the section line.

The section of the statute authorizing the State Board of Land Commissioners to grant rights-of-way for highway purposes is Section 1850, Revised Codes of 1921, which provides in part as follows:

“Right of way shall be granted by the State Board of Land Commissioners, over any of the lands of the state, to any county or city desiring to construct a public highway across the same; provided, that the right of way must always follow sectional or subdivisional lines, if physically practicable; \* \* \*”

The application is in the form required by the statute, and the only question presented is as to the amount of compensation and damages the state should receive, if any, by reason of this highway.

That the statute clearly authorizes the road to detour from the sectional line, where it is physically impracticable to follow the section line, is indicated by the foregoing section. Furthermore, this section contains no intimation that the state is to be compensated, either for damages or for the land actually occupied by the road.

Section 1851, which is a later enactment than Section 1850, authorizes the Land Board to grant a right of way across any portion of state lands, upon such terms as may be agreed upon, for any public use, as defined in the Code of Civil Procedure. The clear intent of this provision is that the state is to be compensated for the right of way, but Section 1850 contains no such intimation, and it is reasonable to assume that, if the Legislature intended a road right of way should be paid for by the county, it would have so provided. The omission was, no doubt, intentional and not an oversight on the part of the Legislature. Nor are the provisions of Section 1850 in conflict with the provisions of the Enabling Act requiring state land to be sold at a minimum price of not exceeding \$10.00 per acre.

A highway is an improvement enhancing the value of the remaining land. Therefore, the state can well afford to dedicate the necessary right of way for road purposes to the public without charge.

As to the feature of damages, the plat shows that 4.63 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$  and 23.12 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$  are cut off from the remainder of the section by the road right of way. There is no question but that the state will sustain damages by reason of the fact that this part of the section will be segregated from the remaining portion of the section, requiring, at least, additional fencing in order to make it available for use in connection with the other land.

Were these lands privately held, the county would be required to pay damages in the amount that the party sustained by reason of the road cutting off a portion of the land from the remaining portion. However, while it must have been apparent to the Legislature, which permitted a road to depart from the section line where it was impracticable to follow the section line, that some damages would result to the section by reason of that fact, nevertheless it made no provision for damages.

It is, therefore, my opinion that the county is under no obligation to pay either for the land or for the damages and that the only charge that can be made is for issuing the deed.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.