

Opinion No. 371**Highways — Public Roads — Abandonment**

HELD: A road does not cease to be a public highway until formally abandoned or changed as provided by law.

October 26, 1933

You request an opinion from this office on the following matter:

"The question has been brought up by certain residents of Madison County as to whether or not the old county road may be kept open for the purpose of a stock driveway between Harrison and Norris, where Federal Aid Project 171-C is being constructed on new alignment, but close enough to the existing road to replace it for general traffic. It is apparently the custom of abutting property owners to fence up the old road as soon as a State highway is completed, if the old road is not needed as a local traffic connection.

"The Highway Commission, in session yesterday, directed me to request your office for an opinion as to what procedure would be necessary on the part of stock men who are interested to maintain these sections of the old road open for the purpose of driving stock, thus keeping them off of the trunk highways."

Sections 1614 and 1650 R. C. M. 1921 provide the method by which highways are abandoned or vacated, and changed. Said sections are as follows:

"1614. All public highways once

established must continue to be public highways until abandoned by operation of law, or by judgment of a court of competent jurisdiction, or by order of the board of county commissioners of the county in which they are situated; but no order to abandon any highway shall be valid unless preceded by due notice and hearing as provided in this act; and no state highway can be abandoned except on the joint order of the board of county commissioners and the state highway commission."

"1650. Upon petition signed by a majority of the freeholders or owners residing upon any common highway, or portion thereof, petitioning that such highway or a portion thereof be so changed as to run on subdivision or section lines, the board of county commissioners must proceed to investigate the same, to all intents and purposes as though it were a petition to establish, change, or discontinue any common highway, as such proceedings are provided for in this chapter, and after such investigation or hearing, may make such change; provided, it can be done without material damage, injury, or serious inconvenience to the public customarily using such highway or portion thereof; provided, further, that those petitioning for such change shall bear all or such portion of the cost and expense thereof as the county commissioners may order."

Section 1614 is specific on the method in which highways may be abandoned. Section 1650 is equally specific on the course to be pursued in changing a highway.

If the right of way of the old road to which you refer was not used in construction of Federal Aid Project 171-C, it is our opinion that the old road will remain a highway until abandoned or changed in one or the other ways provided by the statutes quoted above. If the old road right of way has been lost by anything the Highway Commission has done in constructing the new, then to re-establish the old road as a public highway, the matter would have to be presented to the Board of County Commissioners as provided by statute for the establishment of a new road.