

HIGHWAY COMMISSION:  
ROADS:

Commission may allow coal company to  
mine state highway.

5/27

May 15, 1940



Mr. Louis V. Stigall  
Chief Counsel  
Missouri State Highway Department  
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request  
for an official opinion which reads as follows:

"There has been filed with the  
State Highway Commission by the  
Sinclair Coal Company a petition  
asking for authority to temporarily  
close Farm-to-Market State Highway  
C, in Randolph County, Missouri.

"The Coal Company owns, either in  
fee or by leasehold, all land abutting  
this highway, and also owns the coal  
rights beneath the highway, said owner-  
ship being subject only to the public  
easement. The Coal Company wants to  
remove the coal from beneath the  
highway. They will build a detour  
around the highway which detour will  
be of the same type and quality and  
will meet all highway specifications.  
After the coal has been taken, they  
will restore the road to its original  
condition. If this permit is granted,  
the company will work seventy-five or  
one hundred men during the summer  
months, otherwise these men will be  
out of work. The Commission would  
like your opinion as to whether we  
may grant this request or not."

Mr. Louis V. Stigall

(2)

May 15, 1940

Section 8094, R. S. Missouri 1929, which appears in Article 12, Chapter 42, reads as follows:

"There is hereby created a state highway commission, which shall be vested with the powers and duties specified in this article, and also all powers necessary or proper to enable the commission, or any of its officers or employees, to carry out fully and effectively all of the purposes of this article."

While as the statute provides the State Highway Commission is vested with all the powers and duties specified in Article 12, still as pointed out in State ex rel. St. Louis County v. State Highway Commission, 286 S. W. 1, 315 Mo. 707, "The State Highway Commission is vested with \* \* \* also all powers necessary or proper to enable it to carry out fully and effectively all of the purposes of the act, namely, the construction and maintenance of the State Highway System therein created and defined."

There is no doubt that in Missouri persons owning a coal mine may "mine or excavate beneath the surface of any public highway" just so that such operation does not "cause the surface of the ground over which such public highway is constructed to cave in." Section 13613, R. S. Missouri 1929. This was the law in this state even prior to the enactment of the statute. Gamble v. Pettijohn, 116 Mo. 375, 22 S. W. 783.

Therefore, since a person owning land over which a highway passes has the right to take minerals from under the highway, the question arises can the proper authorities allow said owner to temporarily detour the highway at no cost to the public and mine the highway and then restore the same to its original condition.

We call your attention to the case of Town of Clarendon v. Medina Quarry Co., 92 N. Y. S. 530, 102 App. Div. 217, in which exactly the same question as is present in the instant case was before the court.

We will quote at length from this case because of the close similarity of the facts:

"It cannot be denied that the defendant has a legal right to quarry and take the stone from under the highway. It has the fee to the land within the limits of the highway, and may remove the stone. The public has a legal right to use the land for highway purposes, and this right must not be unnecessarily interfered with by the defendant in quarrying and taking out its stone. So far the parties do not disagree, and no authorities need therefore be cited to sustain the proposition. The only question in dispute is as to the manner in which the quarrying may be done so as to protect defendant's property rights and enable it to remove the stone, and yet not unnecessarily interfere with the public use of the land for highway purposes. The plaintiff's claim is expressed in the terms of the judgment made by the court, but the injunction provided for by such judgment, instead of regulating the doing of the work so as to protect the public rights in the highway, practically prohibits the quarrying of the stone entirely. It provides for a perpetual injunction against any excavation in or obstruction of the highway in any manner, and then permits the quarrying of the stone, provided that, while the work is being done, the highway is maintained open and unobstructed to its full width, and there is no interference with its uninterrupted use for public travel or work or control by the commissioner. It is quite apparent that the quarrying cannot be done without some obstruction and interference with the highway in some part of its width of four rods.

The highway is in the country, is little traveled, and there is no reason why it should be kept open to its full width while the quarrying is going on, or, if bridged, why the bridge should be four rods wide. Much the safer and better way to take care of the travel while the quarrying is being done would be to build a road south of and adjacent to the highway, and use that. The defendant would have to prepare and keep such road in good condition. Very likely the commissioner cannot be compelled to permit such a temporary change in the roads, but if he would do so it would simplify matters very materially. \* \* \* \* \*

Provision should also be made for protecting the town against loss growing out of injuries to persons and property by reason of the temporary obstruction and interference with the highway and public travel thereon while the quarrying is being done, and also for its restoration. There should be a bond given for this purpose in sufficient penalty and with adequate sureties. The quarrying should also be completed within a reasonable time after it is begun, so that the obstruction and the interference with the highway and travel thereon may be temporary and in no way permanent. Such temporary interference with highways, even in villages and cities, is frequently permitted, and, indeed, is never refused in the interests of public improvement and private enterprise, and we see no reason why the defendant should not be permitted to quarry the stone under this highway, so as to reap the benefit derived from the sale thereof, and to enable the public to have the use of the stone. Some inconvenience will be suffered by the public, but, making that as small as

possible and protecting the town from loss, we should permit the quarrying to be done."

In *Dean v. Carroll*, 143 N. Y. S. 12, the Clarendon case was cited and approved. The facts in that case were the same and we quote from the headnote:

"The owner of the abutting lands and the fee of a country highway has the right to quarry the stone under it; he constructing and maintaining a good temporary road during the time of removal and thereafter restoring the highway."

However, in *Town of Albion v. Ryan*, 194 N. Y. S. 261, the rule was modified to the extent that the grant was dependent upon the facts in each case and that if the public were to be unnecessarily or unreasonably inconvenienced, or if the equities in the case were so unequal that permission should be refused. As the court pointed out in the Albion case:

"The obstruction is neither temporary or unreasonable. The defendants nowhere say how long the interruption of public travel may continue while they are excavating this large amount of sandstone. Very likely it will be for years. It will, therefore, be no trifling task to excavate and remove earth and sandstone covering a space 450 feet long, 4 rods wide, and 30 feet in depth, and to fill up such excavation and restore the surface in a condition for public travel."

The court then cites the Clarendon case, but points out that a good temporary road was built by the mining company and that also "it appeared that the highway was little traveled." The court in closing said:

"The defendants have a right to tun-

nel beneath the surface and remove their mineral deposit, provided they can do so without interference with the surface of the highway; but if their operations contemplate a long, protracted interference with the surface, the public rights are superior, and until the controverted questions are settled the rights of the defendants must yield, and those of the public be protected."

In view of the above authorities it will be seen that a person owning property abutting a public highway and also the fee in the highway subject to the public easement may mine the minerals under the highway and it is proper and legal for the authorities to grant him permission to build a temporary road around such public highway subject to the condition that the person will restore the highway to its original condition.

As pointed out in the cases, a bond should be required of the company to insure their fulfillment of these conditions, which bond the State Highway Commission has authority to accept. Section 8136, R. S. Missouri 1929.

We now look to the Centennial Road Law, creating the Highway Commission, to determine whether there is anything in that law which changes or forbids the rule laid down above. It must be remembered that this change of the highway is a temporary detour, the cost of which is to be paid, not by the Commission, but by a private individual.

A thorough reading of Article 12, Chapter 42 discloses no statutes which specifically deal with this situation. Section 8110, R. S. Missouri 1929 (Mo. St. Ann. Section 8110, page 6896), which provides that the Commission shall have power to close temporarily for the purpose of construction or repair any portion of a state highway, obviously does not apply in the instant case because the highway will not be closed but shall continue to remain open although a part



will be a detour. Section 8111, R. S. Missouri 1929 (Mo. St. Ann. Section 8111, page 6896), which provides that the Commission shall have power to purchase, lease, or condemn, lands in the name of the state of Missouri for the purpose of "establishing detours in connection with the location, \* \* reconstruction, widening, improvement or maintenance of any state highway or any part thereof," we believe also does not apply because that section deals only with the situations when the Highway Commission can purchase, lease or condemn lands. Furthermore, we recognize the right of the Commission to relocate roads "when dangerous curves and difficult grades of an earlier location will be eliminated." State ex rel. Highway Commission v. Gordon, 36 S. W. (2d) 105. However, this rule applies only to permanent relocations and not to a temporary change as is requested in this petition. No other section that we can find specifically deals with this situation. Therefore, we must fall back on the general provisions to ascertain whether the State Highway Commission may allow a state highway to be detoured. As our Supreme Court said in State ex rel. St. Louis County v. State Highway Commission, supra, "The highway commission has all powers necessary and proper for the accomplishment of the purposes of the act."

The Legislature saw fit not to confine the powers and activities of the Commission strictly to those enumerated in the statutes as it has done with the Bureau of Building and Loan Supervision (State ex rel. Wagner v. Farm and Home Savings and Loan Association, 90 S. W. (2d) 93), but rather has given it all powers necessary and proper. Section 8134, R. S. Missouri 1929, provides as follows:

"The state highways as herein designated shall be under the jurisdiction and control of the commission; and the commission shall maintain such roads in a state and manner consistent with the present condition of such roads. Provided, that when the roads included in said state highway

May 15, 1940

system have been constructed by the commission, or acquired as provided for herein, they shall be maintained by the commission and kept in a good state of repair at whatever cost may be required. The cost of repairing and maintaining said roads shall be paid out of the state road fund on the warrant of the state auditor, when such payment shall be ordered by the commission. For the purpose of maintaining and repairing such roads, the commission shall have authority to purchase or otherwise acquire, all necessary tools, machinery, supplies and materials, and may employ the necessary labor therefor, and the commission may provide for the proper repair and maintenance of such roads, or any portion thereof, by contract, which shall specify the nature and character of the work to be done. The commission shall also provide for a system of patrol for maintaining and repairing these state highways so that such highways may be effectually and economically preserved and maintained."

As was said in State ex inf. McKittrick v. Missouri Utilities, 96 S. W. (2d) 607:

"In matters immediately concerned with the construction \* \* \* of the highways and their maintenance the commission has jurisdiction."

Therefore, since the right requested by the petition of the Sinclair Coal Company could be granted and was proper and legal prior to the enactment of the Centennial Road Law, and since there is no statute specifically prohibiting such action, we believe such allowance may be made by the Commission in its discretion. This is in harmony with the rule of construction



as laid down in 59 Corpus Juris, 1038:

"All statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts; \* \* A statute will not be given a construction at variance with established rules of law unless the intention to override such rules is clearly manifested."

However, we wish to call your attention again that as pointed out in the cases above, all the facts and equities should be taken into consideration by the Commission before granting any person the right to re-route a highway for the purpose of mining the original section. As in all situations of this kind, the public good is supreme and superior to any private right and the equities should be carefully weighed before permission is given.

#### CONCLUSION.

It is, therefore, the opinion of this department that the Missouri State Highway Commission may, in its discretion, after taking into consideration all of the facts and equities, grant permission to a coal company to mine a state highway, providing the company posts a bond, builds a proper detour and restores the road

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(10)

May 15, 1940

after the work is done, to its original condition.

Respectfully submitted

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APPROVED:

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