

Opinion No. 54-5934

April 2, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Howard McDaniel Representative Colfax County Cimarron, New Mexico

{*382} You have asked my opinion as to whether an adjoining property owner may legally post "no trespassing", "no hunting" or directional signs or information signs in connection with his ranch upon right of way fences belonging to the state and erected by the State Highway Commission.

In my opinion no legal right to use this public property for such a private purpose exists. Neither, technically, could the sign hang over the fence as the public right of way was acquired for public rather than private use. I fully realize the inconvenience this may cause the rancher, who, as you say, may well have donated the right of way to the State or County and naturally feels he is entitled to some consideration. Nevertheless, although the matter is small, it is controlled by the same principles that govern the use of all public property. Art. 4, Sec. 26, N.M. Constitution.

You further inquire, "Does the Highway Department maintain the fences?" We are advised that it is the present policy of the Highway Commission to maintain its right of way fences. We know of no law requiring the Commission to do so, however, and unless it was agreed with the adjoining owner to maintain the fence, it is under no obligation to him to do so. Federal Aid Project Agreements generally require the Highway Commission to maintain the project as shown on the plans, and where fencing is included in the plans there might be an obligation to the United States to maintain it or else get permission to remove it. No doubt the U. S. Bureau of Public Roads could require the upkeep of the fence.

Your last question is "in case animals stray into the highway through these fences is the owner of the animal or the Highway Department liable?" Assuming that you refer to such "liability" to the owner of a vehicle damaged as a result of hitting the animal, I am sure that no damages could be recovered against the State Highway Department because of the State's immunity from suit. *Vigil v. Penitentiary*, 52 N.M. 224.

As to the liability of the owner of the animal in such case, we should first consider Sec. 119.1 (b), Chap. 139, Session Laws of 1953, which reads:

"It shall be unlawful for any person to permit live stock to wander or graze upon any fenced highway at any time * * *."

The owner's criminal liability under an earlier similar statute was discussed in Attorney General's Opinion No. 3188, June 13, 1939, and Opinion No. 3249 dated August 21, 1932. There it was pointed out that if the owner could show that he had notified the

Highway Commission of the broken condition of the fence and that it was not his negligence or lack of diligence which resulted in the stock being on the highway, such could be considered by the judge or jury at arriving at his guilt or innocence.

{*383} Similar evidence would be admissible in a civil action for damages, in my opinion, and although a violation of the statute might be prima facie evidence of negligence, I do not believe it would be conclusive.

The facts and circumstance of each case would also be most important in determining the proximate cause of the accident and resulting liability therefor.

I hope this will answer your inquiry of March 16, 1954, but if I have not covered specifically the question you had in mind, please let me know.

By: John T. Watson

Special Assistant