

Opinion No. 66-108

September 6, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. Hadley Kelsey, Special Assistant Attorney General, State Highway Commission, P. O. Box 1149, Santa Fe, New Mexico

QUESTION

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1. Is the Highway Department required to fence highways in urban areas where it would be illegal to have domestic livestock on the adjacent property?
2. Is the Highway Department required to fence highways when the terrain is such that fencing would be impractical?
3. Is the Highway Department required to fence highways in an area when the adjacent property does not contain livestock?
4. Is the Highway Department required to fence highways where the owners of the adjoining property do not want them fenced?
5. Does the Highway Department have the authority to request property owners to keep their gates closed?
6. To whom do these fences belong and what is the proper maintenance of these fences?
7. Can the Highway Department provide for a condition in giving access that the property owner must agree to maintain the fence around his property?

CONCLUSIONS

1. No.
2. See analysis.
3. See analysis.
4. Yes.
5. See analysis.

6. To the Highway Department. Sufficient maintenance to keep livestock off the highways.

7. See analysis.

OPINION

{*146} ANALYSIS

At issue here is Senate Bill No. 25, effective date, March 1, 1966 (committee substitute), compiled as Section 40A-8-10 N.M.S.A., 1953 Compilation. A portion of this section provides as follows:

". . . The state highway department shall:

(1) construct, inspect regularly, and maintain fences along all highways under its jurisdiction which are constructed or improved from time to time after the effective date of this act, and in addition thereto provide cattle underpasses and water pipelines as may be necessary under such highways."

Your first question asks whether the Highway Department is required to fence highways in urban areas where it would be illegal to have domestic livestock on the adjacent property. We think not.

The obvious purpose of the Act is to keep cattle off the highways in the interest of the safety of the traveling public. In urban areas where it is illegal to have livestock, we must presume that the landowners in the area are obeying the law and that there are not livestock in the restricted area. If there are, however, the solution is not to require the Highway Department to fence the highway but to have the proper authorities bring the necessary action to see that the owner of the livestock complies with the law.

In your second question you inquire whether the Highway Department {*147} is required to fence highways when the terrain is such that fencing would be impractical. The Act does not mention impracticality and we do not believe that mere impracticality would excuse the Highway Department from the duty to fence highways under its jurisdiction if livestock are in the area. In the case of a real obstacle such as a highway cut through rock, steep bluffs or other severe natural barriers, the fence would not have to be continuous but could be fenced up to the obstacle and continued on the other side. **Montgomery v. Gehring**, Mont., 400 P.2d 403 (1965).

You ask in your third question whether the Highway Department is required to fence highways in an area where the adjacent property does not contain livestock. Yes, if livestock are somehow getting onto the highway from other non-adjacent property.

Fourthly, you inquire whether the Highway Department has to fence if the owners of the adjoining property do not want it fenced. The Act is not concerned with the wishes and

desires of the landowners. It is, as previously stated, designed to protect the public traveling on the highway. Therefore, if there is livestock in the area of highways under the jurisdiction of the Highway Commission, the Act requires the Highway Department to fence notwithstanding the wishes of the adjoining landowners.

You next inquire whether the Highway Department has the authority to request (require) property owners to keep their gates closed. Obviously, if a property owner leaves the gates open on highways subject to the jurisdiction of the Highway Department, the whole intent of the Act is defeated and the safety feature reason for the Act is nullified. The Act does not specifically provide for a mandatory injunction against an offending landowner. However, frequent leaving of the gates open would probably justify removal of the gate on the highway under the jurisdiction of the Highway Department and the replacement thereof with a fence. If the courts found such action not to be permissible, the matter should be turned over to the district attorney for prosecution of the offender under Section 40A-8-10 E, supra, if he deems such action appropriate.

As to whom the fences belong, it seems clear that they are owned by the Highway Department. It is that Department which is required by law to construct them and to maintain them. Proper maintenance, about which you inquire, is such that the fences are sufficient to keep livestock off the highway, which, after all, is the purpose of the Act.

You ask whether the Commission can provide as a condition to granting access that the property owner agree to maintain the fence around his property. If you mean the fence along the highway, we would have to say no. Section 40A-8-10 B (1), supra, specifically requires the Highway Department to maintain the fences along all highways under its jurisdiction. So long as the fences are such that livestock are kept off the highways under the Department's jurisdiction, the other fences on the land of the property owner are the business of such property owner. And, if his livestock wander onto another person's property due to poor fencing or no fencing that is a private matter between the parties.

If we have not answered all the questions posed, please consult with us about the subject.