

Opinion No. 50-5284

February 23, 1950

BY: JOE L. MARTINEZ, Attorney General

TO: Burton G. Dwrye State Highway Engineer Santa Fe, New Mexico

{*134} I am in receipt of your recent letter asking for an official opinion on the following:

The State Highway Commission entered into an agreement with the Southern Pacific Company whereby the railroad company was to construct a new crossing on a certain highway project, designated as S-99(1), between Dawson and Colfax in Colfax County, in which it was agreed that the Highway Commission would reimburse the railroad company for the actual cost of reconstructing such crossing, which included crossing planks, etc.

Also, the State Highway Commission entered into an agreement with the A.T.&S.F. Railway Company and another agreement with the Union Potash Company, providing for the constructing of a new crossing across their respective lines of railroad on that certain highway project designated as S-85(4), constructed between Loving and the Potash Mines in Eddy County, which agreements both provided that the State Highway Commission would reimburse such companies for the actual costs of constructing the crossing and other incidental work in connection therewith."

Article 11, Section 7 of the Constitution of the State of New Mexico, states:

"The Commission shall have power and be charged with the duty of * * * and to provide and maintain necessary crossings, culverts and sidings upon and alongside of their roadbeds, whenever in the judgment of the Commission the public interests demand, and as may be reasonable and just. * * *."

Section 74-337 states:

"Every railroad company in this State shall construct and maintain in good condition, at its own expense, good and sufficient crossings at all places in this State where railroad crosses public highways, city, town, or village streets at grade, now or hereafter to be opened for public use. Such crossings shall be constructed of planks, macadam, concrete or other suitable material in such manner as to be level with the top of the rails for a reasonable distance on each side of each rail."

Attorney General's Opinion No. 1758 dated September 15, 1937 stated:

"If the railroad company refuses to do the necessary work, it can not prevent the Highway Commission from going upon its right of way and performing the work in any suitable manner. 51 C.J. 672. For that purpose the State Highway Commission has

authority to expend state funds. The railroad company, however, should ordinarily be held liable to the state for expense because of its duty to maintain the highway crossing."

It is my opinion that as long as the providing and the maintenance of crossings are in public interest and are reasonable and just, it is the duty and obligation of the railroad to do so and the expense should not be borne by the Highway Commission.

You are referred to Attorney General's Opinion No. 5222, written for your office on June 9, { *135 } 1949 in which the law on the above point is discussed in great detail.