

Opinion No. 52-5590

September 12, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. L. D. Wilson Administrative Director New Mexico Highway Department Santa Fe, New Mexico

Re: U. S. Highway 84, Rio Arriba County

OPINION

{*298} On July 31, 1935, judgment was entered in Cause No. 3459, District Court of Rio Arriba County condemning the necessary right of way in the County Commissioners to a portion of Highway 85 and a right of way to the two dike sites here involved. Shortly thereafter a dike was placed at the confluence of three arroyos west of the highway which directed the runoff waters northeasterly and under a bridge in the highway. Before the construction of this first dike, the water of these arroyos formed a delta and spread out fan-like over a large area when a flood occurred, although there was an indication of a small channel running easterly from the location of this dike. To direct the flood waters thus diverted under the bridge, a second dike was built northwest of it.

Since the construction of the first dike, houses have been built on the delta area which might be damaged in the event of heavy rains by removal of this dike. Persons living north of the second dike and near the bridge are concerned for their property in view of recent floods, and want the first dike removed.

The legal responsibilities of the Highway Commission, as a result of this situation, concerning which you have required an opinion, are as follows:

1. Would the Commission be liable in case of flood damage to those persons near the bridge caused by the first dike directing more than previous flood waters in their direction?
2. Would the Commission be liable in damages to those persons now on the old delta drainage area if the dike was removed and a flood thereafter occurred?

An action would not lie against the Commission in either event because the Commission cannot be sued. *Dougherty v. Vidal*, 37 N.M. 256; *Vigil v. Penitentiary*, 52 N.M. 224; *Lucero v. State Highway Department*, 55 N.M. 157.

Regardless of the Commission's liability, the legal course it should follow should depend upon its duty to the public in establishing and maintaining the best highway plan, and, second, those general principles of law applicable and for the breach of which it would be liable if not for the state's immunity.

Should the building of the dike itself be deemed part of the consequential damages for the taking of the property, an action would lie against the Board of County Commissioners. *Summerford v. Board of County Commissioners of Dona Ana County et al.*, 35 N.M. 374. The ten-year statute of limitations would {299} apply. *New Mexico Products Company v. New Mexico Power Co.* 42 N.M. 311. This, however, does not appear to be the case.

The Supreme Court, in *Sanchez v. A. T. & S. F. Railroad*, 33 N.M. 240, citing *St. Louis I. M. & S. R. Co. v. Biggs*, 52 Ark. 240, 12 SW 331, stated the general rule as follows:

"Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original and may be, at once, fully compensated. In such case, the statute of limitations begins to run upon the construction of the nuisance * * * But when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of."

We feel, therefore, that any action by the property owners near the bridge and north of the second dike would be one sounding in tort and subject to the four-year statute of limitations. However, in such a case, no action could even be brought against the County Commissioners (See *Murray v. County Commissioners*, 28 N.M. 309).

Generally, an upper owner has no right to increase materially the flow of water discharged upon a lower estate, nor discharge the water in a different manner than it would usually and ordinarily have gone in the natural course of drainage.

In *Nix v. Alamogordo*, 42 N.M. 325, the city was held liable where, by enlarging a drainage ditch, it received increased quantities of water with increased velocity thereof during heavy rains and floods, and, as a result, during a flood, overflowed upon plaintiff's land. The court also discussed unprecedented floods and acts of God, and quoted *Oklahoma Railroad Company v. Boyd*, 282 Pac. 157, as follows:

"One is not liable for damage resulting solely from an act of God; but if his negligence is a present contributing cause, which co-mingled with the act of God, produces the injury then he is liable, notwithstanding the act of God."

The duty of the Commission to the persons near the bridge, therefore, would seem to be to prevent damage to their property resulting from an increase of flow because of the construction of the first dike, which changed or increased the flow of waters in their direction.

The duty to the people who have built houses on the delta in reliance on the immunity from floods afforded them by the first dike is a much more difficult question. 67 C. J. 875 contains the following statement:

"where an upper owner constructs a drain which has the effect of relieving the lower owner from the burden of drainage, such lower owner has been held to get no right to the continuance of this immunity, or to prevent the upper owner from restoring the water to its original course unless the facts are such as to create an equitable estoppel."

This statement is based upon two cases, *Canton Iron Company v. Biwabik-Bessemer Co.* (Minn.) 65 N. W. 643, where the owner of an upper mining claim diverted water from a ravine for his own benefit, but which, incidentally, relieved the lower mine owner from all flood waters. After the diversion had served its purpose for the upper mine owner, he proposed to remove the same and was enjoined by the lower mine owner. The court held the lower mine owner had no rights, had merely benefitted by the diversion, and could not complain of the restoration of the flood waters to their original and natural {300} course. The diversion had continued for two years. The second case, *Sykes v. Sykes*, (N. C.) 147 S. E. 621, permitted a man who had made extensive boating improvements on a lake formed by a dam to enjoin the dam owner from its removal on the ground that he had obtained certain prescriptive rights after the dam had remained in its location for forty years. Neither case bases its ruling upon the length of time involved.

The recent New Mexico case of *Martinez v. Cook*, decided April 2, 1952, rehearing denied May 28, 1952, 244 Pac. 2d 134, can perhaps be our guide by analogy.

In the *Martinez* case, suit was brought by an upper property owner in Espanola for damages caused by flood waters as a result of the lower property owners closing an abandoned railroad embankment and the city not maintaining an open culvert under a street between the two properties.

"The plaintiffs next say as the waters had drained through the culvert and drainage way for more than 21 years they relied on such drains being kept open, and, with the knowledge of the defendants, made large expenditures of money in erecting their buildings, stocking their stores, etc., and that defendants were estopped to fill in such drains."

The court held that the elements of estoppel were not present; that it was not stated that the city knew or should have known that the plaintiff would make his improvements in reliance of their not stopping the drain. The court viewed the case as the city's abandonment of the drainageway and held

"It seems to be equally well settled that the abandonment or discontinuance of a drain constructed by a municipal corporation will not render the municipalities liable for injuries to the property resulting from the abandonment if the property was not left in any worse condition than it was before the sewer or drain was constructed (Citing cases).

There is no claim the plaintiffs had any more water cast upon them than they would have had if the culvert had never been installed, so they are in no worse condition, so far as water is concerned, than they were before the installation of the drain across the street."

To hold that the Commission owes a duty to those persons who built on the delta in reliance upon the continuation of the dike or that they acquired a prescriptive right to its maintenance, would mean that if the Highway was abandoned or changed, either the Commission must continue maintenance of the dike or the former land owners to whom the dike might revert would have to continue its maintenance.

No facts have been brought to our attention which indicate that the elements of estoppel are present in this case which would require the continued maintenance of the dike for the protection of the property owners below it.

We conclude, therefore, that, basing the Commission's actions solely upon the unenforceable rights of the two groups, those persons near the bridge whose property will receive an increased flow of water due to the building of the first dike should be protected, and that there is no legal duty to protect those persons below the dike on the old delta, other than they be put in no worse condition than they were before the installation of the dike.