

## **January 26, 2010 Responsibility for Maintaining Fences along Rail Runner Railroad**

Honorable Mary Kay Papen  
State Senator  
904 Conway Avenue  
Las Cruces, NM 88005

**Re:** Opinion Request--Responsibility for Maintaining Fences along Rail Runner Railroad

Dear Senator Papen:

You have requested our opinion on several questions relating to a railroad's legal responsibility to erect and maintain fences along its railway track.

### **QUESTIONS:**

1. Who is responsible for erecting the fence, fence repairs and maintenance along the Rail Runner railroad?
2. What is the time frame for completion of the fence along the line and for any repairs needed?
3. What agency enforces the repairs?
4. What penalty is imposed for failure to make repairs and what is the State's responsibility to enforce compliance with the statute?
5. Who is liable to the owner for any livestock that may be injured or killed?
6. Who is responsible for attorney fees should legal proceedings be commenced by an owner whose livestock is injured or killed?

### **ANSWERS:**

1. The New Mexico Department of Transportation, as the owner of the Rail Runner railroad, is responsible for erecting the fence and the making of fence repairs and maintenance as provided by law.
2. Initially, the time frame for erection of a fence along a railroad line is six months from the time the railroad line is open for service. No specific time frame for maintenance of fences is specified. Therefore, a "reasonableness" standard would apply.
3. There is no designated agency responsible for "enforcing" required repairs. The responsibility for compliance lies with the railroad.

4. There is no specified “penalty,” as such, although private suit may be brought by the livestock owner to recover all damages resulting from injury or death caused to livestock.
5. The railroad would be liable for damages as provided by law.
6. The railroad would be responsible for paying attorney’s fees, as permitted by law, should legal proceedings be commenced by an owner whose livestock are injured or killed.

### **ANALYSIS:**

The Livestock Code, Chapter 77, Articles 2 through 18 NMSA1978, contains these provisions at Sections 77-16-16 to -18 regarding the duty of railroads to erect and maintain fences in order to prevent cattle from getting onto the railroad tracks. The statute most pertinent to the questions posed is Section 77-16-16, which provides:

Every railroad in this state whose lines of road, or any part thereof, are open for use, and every railroad company formed or to be formed, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, mules, burros and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities and villages, and shall also construct, where the same has not already been done, and maintain, at all public road crossings, now existing or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, burros, mules and hogs from getting onto said railroad. If any railroad shall fail to construct and maintain such fences and cattle guards as herein directed, such railroad shall be liable to the owner for all damages resulting from injury or death caused to any such livestock, including a reasonable attorney fees [attorney’s fee] on order of the court should legal proceedings be commenced by such owner; provided, further, that should the cattle sanitary board [New Mexico livestock board] be unable to determine ownership of livestock crippled or killed by the railroad within thirty (30) days of the date it first receives notice of such injury or death, by report or otherwise, then the board may institute legal proceedings in the name of such unknown owner in any court of competent jurisdiction and recover damages as herein provided, and the proceeds disposed of as provided for the laws pertaining to estrays.[1]

### Construction and Maintenance of Fence

Section 77-16-16 applies to “every railroad in this state” whose lines are open for use. The Rail Runner is a “railroad in this state” that provides rail commuter service within this State. The New Mexico Department of Transportation, as the owner of the Rail

Runner railroad, would be responsible for erecting the fence and the making of fence repairs and maintenance as provided by law.

We are advised by general counsel for the New Mexico Department of Transportation (NMDOT) that when NMDOT purchased the railroad from Burlington Northern Santa Fe Railway Company (BNSF), fencing was in place in most locations and that when problems have been noted, NMDOT has improved the fencing. NMDOT has further advised that its practice is to do the fencing and patrolling of the fence and to require notification from adjacent property owners when they notice fencing problems which require attention.

### Timeframe for Construction and Maintenance

Section 77-16-16 specifies a timeframe for initial fence erection of six months from the time a railroad line is open for service. No specific time frame for repair and maintenance is specified. Therefore, a “reasonableness” standard would apply to repair and maintenance. See, e.g., Board of Educ., Peñasco Independent School Dist. v. Rodriguez, 77 N.M. 309, 311, 422 P.2d 351, 352 (1966) (where statute conferring right to appeal does not fix the time within which to appeal, “it will be presumed that the legislature intended that the appeal be perfected within a reasonable time”); Smith v. Galio, 95 N.M. 4, 7, 617 P.2d 1325, 1328 (Ct. App. 1980) (“[w]here a contract is silent as to the time of performance, the law implies that it is to be performed within a reasonable time”). NMDOT’s general counsel advises that, with respect to the Rail Runner, NMDOT has applied a “reasonable person” standard as the timeframe for completing fence line improvements, and that it has paid for cattle that have been struck and killed before completing an improvement. According to Section 77-16-16, six months from the date each segment of the Rail Runner has been purchased and placed into commuter operation by NMDOT, thus making it “open for use” as a commuter rail service, may constitute the statutory maximum period within which to complete the improvements necessary to erect a “suitable” and “sufficient” fence.

### Enforcement and Penalty for Noncompliance

Under Section 77-16-16, there is no designated agency responsible for “enforcing” required repairs. The responsibility for compliance lies with the railroad. With respect to the Rail Runner, compliance responsibility lies with the NMDOT, as the owner of that railroad. Under Section 77-16-16, there is no specified “penalty,” as such, although private suit may be brought by the livestock owner to recover “all damages resulting from injury or death caused to any such livestock.” (Emphasis added).

### Liability for Owner’s Damages and Attorney’s Fees

Under Section 77-16-16, a railroad that fails to construct and maintain fences as required by that statute, “shall be liable to the owner for all damages resulting from injury or death caused to any such livestock, including a reasonable attorney fees [attorney’s fee] on order of the court should legal proceedings be commenced by such

owner.” Thus, under this section, the railroad would be liable for damages as provided by law, and the railroad would be responsible for paying attorney’s fees, as permitted by law, should legal proceedings be commenced by an owner whose livestock are injured or killed.

NMDOT’s general counsel advises that, with respect to claims against the Rail Runner, if it is established to the satisfaction of Risk Management and General Services Department that a claim should be paid, it is paid by NMDOT’s insurance. If such claims require involvement of attorneys, those claims would follow the normal Tort Claim process, including payment for attorney’s fees.

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ANDREA R. BUZZARD  
Assistant Attorney General

cc: Albert J. Lama, Deputy Attorney General

[1] Section 77-16-17 describes a “sufficient and suitable fence” for purposes of Section 77-16-16: “[A] fence at least four and one-half feet high, constructed of posts and wire, the top wire to be four and one-half feet above the ground and shall have at least four wires upon posts not exceeding twenty feet apart.”