

Opinion No. 38-1946

May 5, 1938

BY: FRANK H. PATTON, Attorney General,

TO: Mr. G. F. Conroy State Highway Engineer Santa Fe, New Mexico. Attention: Mr. R. W. Bennett, Office Engineer.

{*232} In your letter of yesterday you inquire what recourse may be had to prevent encroachments upon the highway rights of way made by the moving of fences and buildings into the right of way on the part of property owners.

Three different statutes prohibit the placing of structures on highways, and at least two of these make such acts misdemeanors. Sections 11-710, 64-1307 and 64-1310, 1929 Compilation. See also Opinion No. 188. Prosecutions under those statutes may be had through the district {*233} attorney upon complaint of any highway official or other person.

Where the encroachment is made in good faith upon a claim of right, prosecutions probably would not be advisable. Such claimed right may be tested by a suit on the part of the State to remove the encroachment as a nuisance. "The public has the right to the exclusive use of highways for public purposes, and any unauthorized obstruction thereof is a nuisance". -- 29 C. J. 616. "In general it may be said that an unlawful obstruction or encroachment may consist of anything which renders the highway less commodious or convenient for the use of the public, such as buildings or other structures * * *". -- 29 C. J. 617.

The State Highway Commission is given full control and supervision of highways by the statutes. Sections 64-330 and 64-333, 1929 Compilation. Such suits should, therefore, be brought through or at the instance of the State Highway Commission.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.