

Opinion No. 39-3249

August 21, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. J. O. Walton, Assistant District Attorney, Hobbs, New Mexico.

{*94} In your letter of August 17 you state and make inquiries as follows:

"As you know, Chapter 172, New Mexico Session Laws of 1939, makes it unlawful for the owner of any cattle to permit or allow them to run at large upon any state or public highway of this state which is fenced on both sides. In a great many instances, the fence has been put up by the State Highway Department as a part of their road building program.

In Lea County where we have a great many drunken drivers, these fences are torn down and the ranchers, of necessity, have to repair them.

Now, the question is, who should properly bear the expense of this repair, or is it a duty of the highway to make the necessary repairs? If the fence is owned by the state, do the ranchers have a right to sue the driver of the car for the repairs that he makes? Or if the state has a cause of action, whose duty is it to bring the suit?"

If the fence has been put up and is owned by the State Highway Department I do not think there is any legal duty on anyone other than the Highway Department to repair the same. If the rancher makes the repairs himself, then no doubt the State Highway Department and everyone else will be very much obliged and the rancher might incidentally obtain some benefit thereby. However, if the rancher or other person who discovers a state-owned highway fence to be in need of repairs will notify the State Highway Department, I am sure that said department will repair the fence forthwith. Mr. Wilson of the Right-of-Way Division informs me that the State Highway Department makes it its duty as a matter of public policy to keep its fences in repair. Where the fence is the fence of a private person, then the Highway Department has not usurped any authority to repair the same. Whether or not the Highway Department could usurp this latter authority is not now being ruled upon.

If the fence is owned by the state, the rancher has no right to sue the driver of the car for the repair he makes on the fence. In other words, the Highway will repair the fence if advised. If the rancher fixes it himself, he does so at his will and has, in my opinion, no cause of action against the driver although the State Highway Department might have, in which case it would be the Highway Department through the State Highway Commission that would be the party plaintiff.

If a rancher's cattle should go upon the highway as the result of a broken down State Highway-owned fence, I don't think that in the case of prosecution against such rancher

under Chapter 172 the State would get very far if the rancher will show that as soon as he knew or reasonably should have known that the state-owned fence needed repairs he notified the State Highway Department of that fact.

The language of Chapter 172 has been considerably toned down by an opinion from this office (No. 3188) holding that {*95} the act does not impose absolute liability upon the cattle owner whose cattle are found on the highway. In other words, if a defendant makes a showing that he used due diligence he would not be criminally liable under this opinion, a copy of which I enclose herewith for your information.

I believe the foregoing generally answers your question.

By: FRED J. FEDERICI,

Asst. Atty. Gen.