

Opinion No. 45-4644

January 24, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. L. D. Wilson Right of Way Engineer State Highway Department Santa Fe, New Mexico

Re: NRH 178-B, Unit 2, Right of Way

OPINION

{*9} Replying to your recent letter requesting an opinion relating to circumstances arising out of the relocation of approximately six hundred feet of the above highway "several years ago." You state that by reason {*10} of the relocation of the highway a portion of the old highway was used to relocate a Conservancy District canal on the old highway at the time of abandonment as a highway, and that the abutting owners of the portion of highway abandoned removed the fences and occupied the portion of abandoned highway not occupied by the new location of the canal. This arrangement appears to have been satisfactory to all parties concerned for "several years."

Inasmuch as your questions are interspersed among facts in your letter, I briefly restate them as follows: 1. After the relocation of the highway in whom vested the title in fee to the portion of highway abandoned? 2. May the abutting property owners of the portion of highway abandoned compel the canal owners to provide for and give the right of access to the new highway over a portion of the canal located on the abandoned portion of the old highway?

Inasmuch as you are particularly conversant with the statutes involved, I will refer to the statutes by section number without copying the whole thereof, the sections being 58-101, 58-104 and 58-105, New Mexico Statutes Annotated, 1941 Compilation.

Section 58-105 provides, pertaining to question No. 1, that the fee of the abandoned portion of the highway vested in the state so long as "such right of way is so used for highway purposes." I have searched the laws of New Mexico, Supreme Court Reports, Opinions of the Attorney General, and it appears that this question has not been adjudicated or officially commented on in New Mexico. It is my opinion that when the portion of the highway was abandoned, the title thereto reverted to the abutting owners in fee without limitation. 13 Ruling Case Law, "Highways", Section 106, page 116, states the general rule as follows:

"The right acquired by the public in respect of land devoted to highway purpose is ordinarily a mere easement of passage over it, with the powers and privileges incident thereto, the fee title remaining as it was before the highway was established."

See also cases segregated in 70 A. L. R. at page 564, 18 A. L. R. at page 1008, and 42 A. L. R. at page 236.

Opinion on question No. 2. It is my opinion that the State Highway Department is under no liability to the abutting owners, and that any controversy between the abutting owners and the Conservancy District is outside the jurisdiction of the Highway Department and for that reason we give no opinion as to that question.

By THOS. C. McCARTY,

Asst. Atty. General