

**Public Highways. Crossing Over Railroads.**

Where public highways are to be constructed across railroads it is the duty of the railroad companies to construct crossings at their own expense, and maintain suitable cattle guards and fences at such crossings. When such crossings are deemed necessary, it is the duty of the County Commissioners to make an order requiring railroad companies to construct the same; and if the order is not obeyed it then becomes the duty of the county attorney to institute proceedings in the district court to compel the railroad companies to construct the crossings.

Helena, Montana, April 19, 1907.

Hon. John L. Slattery,  
County Attorney,  
Glasgow, Montana.

Dear Sir:—

Yours of the 16th relative to public highway crossings over railroad tracks duly received.

We quote your request:

“Will you kindly give me your opinion as to whether the

county or the railroad company must bear the expense of the construction of a public highway across the road-bed of the railroad company; also whether or not the county is liable to the railroad company for the cost and maintenance of the cattle guards and fences made necessary by the construction of such highway."

I call to your attention Section 71, Chap. 40, page 86, Laws 1903:

"Whenever highways are laid out across railroads, canals or ditches on public lands, the owners or corporations using the same must at their own expense so prepare their roads, canals or ditches, that the public highway may cross the same without damage or delay; and when a right of way for a public highway is obtained through a judgment of any court, over any railroad, canal or ditch, no damage must be awarded for the simple right to cross the same." See, also 8 Am. & Eng. Enc. Law, p. 377.

If a road is to be a public highway on public lands, and there is a public necessity for same, and provided that the point where the wagon road is to cross the railroad is not on land reserved by the railroad company for building purposes, there is an undoubted right, by virtue of our statute above quoted, as well as that of public necessity, under the police powers of the State, for the same to be constructed across the railroad track at the expense of said railroad company. And it follows, as a matter of course, that a railroad company must maintain the guards and fences made necessary by the construction of such a highway.

If the Road Supervisor and County Commissioners find, as a matter of fact, that there is a necessity for such a crossing, as indicated in your request for an opinion, it is the duty of the Board of County Commissioners to make an order, directed to the railroad company, to prepare a crossing for the wagon road, within some reasonable time to be fixed in the order. If such an order is made, and is not obeyed by the railroad company, then it will be your duty to commence an action in the district court to compel the railroad company to construct the crossing desired.

Very truly yours,  
ALBERT J. GALEN,  
Attorney General.