

State Highway Commission—Damages—Crossings—Irrigation Ditches.

The State Highway Commission is not required to install a crossing over an irrigation ditch when the ditch is on public land. A siphon or culvert installed must be kept open by the owner of the ditch.

January 19, 1928.

State Highway Commission,
Helena, Montana.

Gentlemen:

On November 2, 1927, I rendered an opinion relative to a claim for damages to crops by reason of a siphon failing to function during the irrigation season.

Upon further consideration of this matter I desire to make some changes in the opinion as formerly written.

The facts are that a siphon had been placed across the state highway, F. A. P. No. 127, for the purpose of conveying irrigation waters of the Pioneer Ditch Company. It appears that the siphon became clogged and failed to function properly, and the damages are claimed by the insufficiency of the water for irrigation purposes caused thereby. You wish to be advised:

First: Whether the state highway commission is responsible for the continued proper functioning of culverts and siphons after they have been installed and have given service.

Second: Whether it will embarrass the commission at this time if the siphon is replaced by an open culvert.

Third: Whether the commission is liable for damages as claimed.

A siphon or culvert constructed for the purpose of effecting a crossing of the highway by a ditch or waterway is a part of the ditch or waterway for the benefit of which it is constructed, and it is placed there so water may be conveyed across the right-of-way without injuring the highway and without impeding the flow of water. It is not the duty

of the commission to see that it is kept open and kept free from debris after it has been properly installed. This duty devolves upon the owner of the ditch or waterway.

In my original opinion I quoted section 1647, R. C. M. 1921, as authority for the statement that it is the duty of the ditch owner to install culverts and crossings where the highway crosses a ditch, canal, or railroad right-of-way.

Upon further investigation I find that this section, as it appeared in our codes of 1895, was adopted from the California political code, section 2694, and in both the California code as well as in our codes of 1895 and 1907, it reads "on" public lands. When it was re-enacted as a part of chapter 72 of the laws of 1913 "on" was changed to "or" and this was carried forward in subsequent re-enactments so that it has ever since read "or" public lands. "Or public lands" has no meaning when read in connection with the remainder of the section, and as there has never been any other change made in the section, it must be presumed that the legislature did not intend to nullify the words "public lands" by placing the disjunctive "or" before these words, but that it intended that where railroads, canals, or ditches were located on public lands the owners must so prepare them that the highway might cross the same.

With this construction of this section it necessarily follows that where the crossing is not upon public lands the cost of preparing the necessary crossing must be borne by the highway commission where it procures the right-of-way. It does not appear from the facts in this case whether the ditch was on public or private land at the point where the crossing was made.

Culverts or ditches when installed must be kept in repair by the county. (Section 1733.) This does not mean, however, that the county is required to see that the culvert does not become clogged with debris so as to obstruct the passage of the flow of water, but only that the bridge or culvert must be repaired from time to time by reason of travel.

It is therefore my opinion that the state highway commission is not liable for damages to crops by reason of the stoppage of the flow of water on account of being filled by a deposit or debris, assuming that the siphon was properly installed in the first place.

In any event damages would only extend to the cost of installing a culvert or siphon of sufficient size to convey the water, assuming that it was the duty of the highway commission to install in the first instance.

It is further my opinion that no embarrassment can follow if the commission sees fit to install a culvert at this time.

Very truly yours,

L. A. FOOT,
Attorney General.