

## Opinion No. 54.

**State Highway Commission—Liability for Damages—Damages.**

Held: State Highway Commission is not subject to action for damages, as suit against commission is suit against state.

State Highway Commission cannot legally settle claim for damages caused by defective highway.

May 17, 1943.

Mr. H. G. Dean  
Secretary and Attorney  
State Highway Commission  
Helena, Montana

Dear Mr. Dean:

You submit the following statement of facts:

"Water run offs during the month of March reached flood stage in many sections of Montana. Since said run offs the State Highway Commission has received several letters in which the writers claim flood damages allegedly caused by state highway fills, inadequate drainage and negligent construction. Two of the claimants threaten suit unless prompt settlement is made."

In connection with this statement, you ask my opinion covering the following questions:

"1. Whether the Highway Department can legally settle damage claims caused by negligence on the part of the commission, the Highway Department or its employees;

"2. Whether the commission is subject to suit for damages; and

"3. If your answer to the above queries is in the negative, then what procedure should claimants follow?"

If action is instituted and results in a judgment against the commission, it in effect would be a judgment against the state, in that moneys to the credit of the highway funds would be required to satisfy the judgment.

No consent has been given by the state for action against it, and it has been the uniform rule of our Supreme Court that, in the absence of such consent, the state is not subject to suit. (State ex. rel. R. M. F. Co. vs. Toole, 26 Mont. 22, 27, 66 Pac. 496; Mills v. Stewart, 76 Mont. 429, 439, 247 Pac. 332; State ex. rel. Freebourn v. Yellowstone County, 108 Mont. 21, 27, 88 Pac. (2d) 6; McKamey vs. Aiken (Tex.) 118 S. W. (2d) 482; Hjorth Royalty Co. vs. Trustees, 30 Wyo. 309, 222 Pac. 9; Schwing vs. Miles, 367 Ill. 436, 11 N. E. 944; Fidelity and D. Co. vs. Trustees of University of Wyo., 16 Fed. 150; State Highway Commission vs. Utah Construction Co., 278 U. S. 194.)

While there is no decision of our Supreme Court to cite as a precedent covering an action against the State Highway Commission, the District Court of Gallatin County in the action of Coldwater v. State Highway Commission, an action for damages by reason of unsafe condition of a highway, sustained a demurrer to the complaint, the defendant's contention being it was not subject to action for damages. This ruling is supported by abundant authority holding such a commission cannot be sued. (Grande v. Casson, 72 Pac. (2d) 676, 681 (Arizona); Barker vs. Hufty Rock Asphalt Co., 18 Pac. (2d) 568, (Kansas); United Contracting Co. v. DUBY, 292 Pac. 309 (Oregon); Payne v. State Highway Commission, 16 Pac. (2d) 509 (Kansas); New Mexico State Highway Commission v. Bible, 34 Pac. (2d) 295 (N. M.); Dougherty v. Vidal, 21 Pac. (2d) 90 (N. M.); State ex. rel. Davis v. Circuit Court, 126 So. 374 (Fla.); Fann v. State Highway Dept., 152 S. E. 429 (S. C.); U. S. Casualty Co. v. State Highway Dept., 151 S. E. 887 (S. C.).

It is further noted no fund has been appropriated by the legislature for the payment of such claims, and in Vol. 16, Report and Official Opinions of Attorney General, page 31, it has been held that—in the absence of such appropriation—the State Highway Commission has no authority to pay such claims.

It is therefore my opinion, under the facts stated, the State Highway Commission is not subject to action for any damages sustained, and further the commission has no legal authority to settle the claims.

No opinion is expressed as to your third question as the claimants should consult private counsel relative thereto.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General