



OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007
August 26, 1975

BRUCE E. BABBITT
ATTORNEY GENERAL

(R75-291)
McDougal
75-291

Mr. Carter A. Clark
Chief Right of Way Agent
Department of Transportation
Highway Division
205 South 17th Avenue
Phoenix, Arizona 85007

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Re: Project S-222-708
Gila Bend - Ajo - Tucson Highway
Robles Junction - Avra Valley Road
and 43 U.S.C.A. § 932

Dear Mr. Clark:

This is in response to your request for a legal opinion in connection with the above referenced highway project.

The facts having bearing upon our answers to the questions you posed are as follows:

Prior to the construction in 1936 of the roadway traversing State Route 86, Pima County obtained the necessary right of way from both public and private sources. The right of way obtained over the federal public domain was acquired pursuant to R.S. §2477 (the language of which is now embodied in 43 U.S.C.A. §932). The interests in lands necessary for the construction of the roadway over privately held parcels were acquired through perpetual easements which describe both rights of way and protective drainage dykes. The questions you posed deal with the maintenance and construction of these protective drainage dykes both with respect to the interests in lands obtained from the Federal Government as well as from private parties. The first question posed is as follows:

Question No. 1 Does the State of Arizona have sufficient rights under the above Federal Statute to reconstruct and maintain the dyke and drainage system?

43 U.S.C.A. §932 provides as follows:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

In 1936 Pima County, a political subdivision of the State of Arizona, constructed the roadway in question over federal lands



within the public domain and the highway was subsequently accepted by the public. The granting of rights of way was for the construction of highways. The statute does not define the scope of highways.

Even though 23 U.S.C.A. §101, et seq., dealing with highways, was enacted subsequent to R.S. §2477, 23 U.S.C.A. §101(A) does define the term "highway" to include:

...roads, streets, and parkways, and also includes rights-of-way, bridges, railroad highway crossings, tunnels, drainage structures, signs, guardrails, and protective structures, in connection with highways.

In this particular instance, the dyke and drainage system is specifically included in the definition of the term "highway" found at 23 U.S.C.A. §101(A).

Pima County, having acted in good faith and in reliance upon 43 U.S.C.A. §932 (R.S. §2477), constructed the subject roadway as well as the necessary drainage structures. The Arizona Highway Department accepted the subject roadway into the State Highway System as State Route 86. Therefore, the Arizona Department of Transportation, stepping into the shoes of Pima County, is vested with authority under 43 U.S.C.A. §932 to reconstruct and maintain the dyke and drainage system.

Question No. 2. Does the State have sufficient rights under the recorded easements to reconstruct and maintain said dykes and drainage system?

The answer to question number 2 is somewhat more difficult and will depend on a parcel-by-parcel analysis. However, in an effort to guide the Department, the following suggestions should prove helpful.

Referring specifically to the typical deed attached to the opinion request, the first determination which must be made is whether or not the dykes and drainage system are within the area granted to Pima County for a highway easement. If the dykes and drainage structures are located within that easement area, then the State would have the authority under the various recorded instruments to proceed with the proposed maintenance and reconstruction. This conclusion is based on the recital contained in the deed submitted with the opinion request which provides:

The grantee requires a right-of-way over and perpetual easement to a parcel of land belonging to the grantor, upon which

August 26, 1975

the grantee may construct and maintain thereafter a public highway, and all incidents thereto.

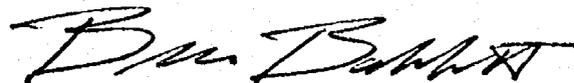
The question is whether or not drainage structures would be included in the terms of the recital. Numerous types of drainage structures are utilized in the construction of highways. Such structures include, but are limited to culverts, channels, dykes and bridges. Inasmuch as any or all of these structures may be necessary to construct a highway which will bear up under natural terrain features and acts of God, such as rain of flooding, they may safely be considered as incidents to the construction of maintenance of public highways.

In summary answer to question number 2, the Department must look at each instrument of conveyance and make the following determinations before proceeding with maintenance and reconstruction:

1. That the dykes and drainage system are contained within the area conveyed to Pima County.

2. The Department must also determine that the words of conveyance authorize Pima County to construct and maintain the public highway. If both elements exist, then the Arizona Department of Transportation is authorized to maintain and reconstruct the dykes.

Sincerely,



BRUCE E. BABBITT
The Attorney General

BEB/PSH/dl