

13
May 9, 1928

Arizona State Highway Commission,
Phoenix, Arizona.

Gentlemen:

Attention: Mr. McBride, Chairman

We hand you herewith our opinion upon the question of what is the power and authority of the Highway Commission with respect to applications to construct spur tracts or railway switches across the public highway.

The provisions of the laws of the State of Arizona to be considered are Section 2319 Revised Statutes, Arizona, 1913, Civil Code, Section 1, Chapter 2, and Section 11 (j) of the Highway Code.

Section 2319 of the Civil Code provides that no public road, highway or street shall be constructed across a railway, nor the track of any railway be constructed across a public road, highway or street without having first secured the permission of the Corporation Commission, and the Corporation Commission may refuse its permission, or may grant it upon such conditions as it may prescribe. The Corporation Commission is given the further power to determine the place and manner of crossing and the proportionate expense to be paid where a separation of grades is required. The purpose of this section, in so far as it applies to the highways, was to protect the public in the use of such highways and to prevent crossings dangerous to the public from being placed on the highways. The duty of enforcing the provisions was placed in the Corporation Commission.

The Highway Code, Chapter 2, Section 1, provides:

"The Arizona Highway Department is hereby created and declared to be a department of the State Government, with the peculiar and express function of administering in the manner provided by law, all matters and affairs, directly effecting, concerning or relating to the highways of the State."

By Section 2, the control of the department is placed in the Highway Commission.

Section 11, Chapter 2 of the Highway Code provides:

"The Commission shall have the power, and it shall be its duty:

(j) to exercise complete and exclusive control and jurisdiction of and over the state highways of the State, and to prescribe such rules and regulations to govern the use of all

#2--

state highways as it may deem necessary for public safety and convenience, and to prevent the abuse, and unauthorized use of such highways."

The effect of these two sections of the Highway Code is to transfer from the Corporation Commission to the Highway Commission the powers and duties given to the Corporation Commission under Section 2319 in respect to railway tracks crossing highways. The granting of a permit to construct a track across a highway of the State is a matter directly affecting, concerning and relating to the highways of the State. Under the provisions of Section 1, Chapter 2, it is made the peculiar and express function of the Highway Department to administer such matter. Under Section 11 (j), the Highway Commission has the power and duty to exercise complete and exclusive control and jurisdiction of and over the State highways of the State. This of necessity must include the power and duty to determine where and in what manner railway tracks may be constructed across such highways. If this power or function may be exercised by some other Department, then the control and jurisdiction of the Highway Commission over the State highways is not complete and exclusive.

The effect of Sections 1 and 11 (j), Chapter 2 of the Highway Code is to place in the Highway Commission powers formerly had by the Corporation Commission under Section 2319 supra, in respect to railway tracks crossing highways.

Very truly yours,

STRUCKMEYER JENNINGS & STROUSS

By CHARLES L. STROUSS