O-4607

A.G. FILE

OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Charles E. Reagan
District Attorney
Marlin, Texas

Dear Sir:

Opinion No. O-4607
Re: Commissioners' Court is authorized to pay damages to adjacent landowner who is damaged by diversion of water by reason of construction of county road. Payment should be made from the General Fund of the county.

Your request for opinion upon the following stated questions:

"Can the Commissioner's Court of Falls County by a proper order pay damages to an adjacent landowner for the diversion of water by reason of the construction of a road?

"If you have answered the above proposition in the affirmative, then what fund or funds of the County can such payment be made?"

has been received and carefully considered by this department.

Article 6730, Vernon's Annotated Texas Civil Statutes, cited by you in your letter, provides:

"The earth necessary to construct a causeway shall be taken from both sides, so as to make a drain on each side thereof. Whenever it is necessary to drain the water from any public road, the overseer shall cut a ditch for that purpose, having due regard for the natural water flow, and with as little injury as possible to the adjacent land owners. In such cases the

commissioners court shall cause the damages to such premises to be assessed and paid out of the general revenues of the county, and in case of disagreement the same may be settled by suit as in other cases."

The case of Angelina County v. Bond, 16 S. W. (2d) 338, cited by you in your letter, holds that a county is liable for damages to lands by backing up surface waters in the construction of a county road. We quote from the court's opinion in said case as follows:

"Under the common law a county is not liable for damages growing out of the negligence of its officers or agents. This is the rule in this state, unless such liability is created by statute, either by express words or by necessary implication. Heigel v. Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 83; Nussbaum v. Bell County, 97 Tex. 86, 76 S. W. 430; Harris County v. Gerhart, 118 Tex. 449, 283 S. W. 139. The negligence of Angelina county and its agents was not an issue. Appellee's suit is not based upon the negligence of appellant's officers or agents. His petition alleged a taking of his property for public use without compensation. If in fact appellant took or damaged appellee's property for public use, it rested under the absolute duty to compensate him therefor. Under statutory provisions property may be taken or damaged by counties for public use in establishing and maintaining public roads, and the authority thus given embraces the making of ditches and drains and the building of embankments. It is therefore true, as contended by appellee, that, when this authority is properly exercised, a county may be made liable for damages thereby caused to private property. This would be a case in which liability is expressly imposed upon the county. Article 6730 (6935) (4745) R. S. 1925. Nussbaum v. Bell County, 97 Tex. 86, 76 S. W. 430. The cited article, 6730 (6935), specifically declares: 'Whenever it is necessary to drain the water from any public road, the overseer shall cut a ditch for that purpose, having due regard

to the natural water flow, and with as little injury as possible to the adjacent landowner; Provided, that in such cases the commissioners' court shall cause the damages to such premises to be assessed and paid out of the general revenues of the county, and in case of disagreement between the commissioners' court and such owner, the same may be settled by suit as in other cases.'

"In Palo Pinto County v. Gaines (Tex. Civ. App.) 168 S. W. 891, it was held that this statute expressly made a county liable for damages to adjacent landowners for the overflow of lands incident to the construction and maintenance of its roadways. In that case, as in this, the road was so constructed as to cause the surface water to accumulate and back upon and over the plaintiff's land and destroy his growing crops. The county was held liable under the statute just quoted, and the Supreme Court refused a writ of error. See, also, Southern Surety Co. v. McGuire (Tex. Civ. App.) 275 S. W. 848; Harris County v. Gerhart, 115 Tex. 449, 283 S. W. 139; Jones County v. Moore, (Tex. Civ. App.) 4 S. W. (2d) 289 (writ refused)."

It is our opinion that your first question should be answered in the affirmative.

It is our opinion in answer to your second question that payment for such damages should be made from the General Fund of the county.

We wish to express our appreciation for your citation of pertinent authorities in your letter.

Very truly yours

ATTORNEY GENERAL OF TEXAS

APPROVED 1948

Gerald C. Mann

By Wm. J. Fanning

Wm. J. Fanning
Assistant

WJF:GC

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OPINION
COMMITTEE
BY BWB
CHAIRMAN