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Review of Legal Implications to Closing or Reducing Maintenance on Rural Roads

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Given the ongoing challenges in maintaining North Dakota's extensive rural road network, road prioritization is becoming a reality for officials at all levels of government. As counties and townships consider reducing road maintenance or closing low-traffic roads altogether, how can they limit tort liability and minimize road-related lawsuits?

Counties Immune from Suit Only If Action Is "Discretionary"

Neither the state nor counties or townships in North Dakota are immune from lawsuits connected with closing, abandoning or assigning minimum maintenance designation to roads — unless their actions qualify as "discretionary functions," those for which governmental/sovereign immunity still exists, as long as the governmental unit has not been negligent.

Specifically, a county's action may be discretionary if it is "a matter of choice for the acting employee" — meaning no statute, regulation or policy specifically prescribes an action for the employee to follow. For example, if a county is going to post a sign warning of hazardous conditions, in order for the action to be discretionary, there cannot be a statute in place designating how and where to post signs.

Most federal court decisions regarding road maintenance have held that actions with respect to road maintenance are discretionary functions, and therefore immune from suit. Generally, the possibility that actions can be called "discretionary" dramatically increases if counties and townships:

- Follow applicable procedural statutes
- Present a good faith effort to minimize risk to the public
- Base maintenance and signing decisions on not only economic but other factors, including historical maintenance and alternative routes available

For road maintenance and sign-posting decisions to be discretionary, thus minimizing or eliminating tort liability, the prerequisites are that there cannot be a specific and mandatory statute regarding how the decision is to be made, and that the county or township has not been negligent.

What Can Counties Do?

To minimize tort liability, officials making road closure or minimum maintenance decisions should follow these important steps:

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- **Fulfill Negligence Duty:** Counties and townships must do what is necessary to make roads safe from unusually hazardous conditions for travelers “using ordinary care” and driving within the limits of the law.
 - **Fulfill Statutory Duty:** Counties and townships must follow the appropriate statutory procedures for designating minimum maintenance roads or making road closures (see flow charts for an outline). These procedures are detailed in the North Dakota Century Code; relevant sections are included in the full version of this report (MPC 97-69).
 - **Obtain Legal Clarification:** In following statutory procedures, counties and townships should ask for clarification, if necessary, from the North Dakota Attorney General’s office. These opinions will assist in clarifying the scope or language of Century Code statutes.
 - **Document All Actions:** Counties and townships should keep careful documentation of their actions, since not only economic considerations, but historical maintenance of roads, costs to repair in comparison with costs to close or abandon a road, disruption to road activity and alternative routes available to travelers are all factors courts may look at in determining if the discretionary function exception would apply to a road maintenance decision — therefore making it immune from lawsuits.

- **Involve the Public:** Public input can play an important role in minimizing road-maintenance-related lawsuits, by increasing road user satisfaction and making the process easier to implement. This public process not only educates road users, but allows officials to gain road users’ perspectives on critical road needs and potential funding mechanisms.

Conclusion

Today, governmental entities are no longer immune from lawsuits, and issues of tort liability are of great importance if counties and townships wish to minimize liability related to road maintenance and closure decisions. In making these decisions, counties and townships have immunity only if their actions can be characterized as discretionary functions.

Counties choosing to close roads or designate minimum maintenance must fulfill both negligence and statutory duties to the public, following statutory procedures described in the North Dakota Century Code. Clarification from the Attorney General, if needed, and full documentation of all actions are also key factors in minimizing road maintenance related lawsuits. Public input and education may be equally important, as road needs and project funding become more critical.

A full copy of the study “Legal Implications to Closing or Reducing Maintenance on Low Volume Roads in North Dakota”(MPC Report No. 97-69), including relevant rural road North Dakota Century Code sections, is available from the Upper Great Plains Transportation Institute. (Contact: Jill Hough (701) 231-8082.
