N.D.A.G. Letter to Johnson (March 2, 1987)

March 2, 1987

Mr. Dennis Edward Johnson
McKenzie County State's Attorney
P. O. Box 1288
Watford City, ND 58854

Dear Mr. Johnson:

As a follow-up to my letter of August 4, 1986, I am forwarding to you the results of the research performed by my staff concerning the priority of rights of way and canal easements.

McKenzie County officials are in a dispute with members of the Lower Yellowstone Irrigation Project. The irrigators maintain canals next to section line roads and, I understand, the canals actually infringe upon these roads. The canals were built with the federal government's authorization and under a 1890 law that created a right of way for irrigation canals over certain public lands. The irrigators now propose to widen the canal. This will cause additional encroachment upon the section line roads making them narrower than the sixty-six foot statutory width.

The dispute concerns authority over section line roads. Do county and township officers have control of these roads, or does the irrigation project have the right to take the roads for canal purposes? You have asked this office for assistance in resolving this dispute.

Upon the study of law concerning the congressional grant of rights of way for highways over section lines and the federal statutes by which the Lower Yellowstone Irrigation Project operates, it is my view that the irrigation project does not have the right to encroach upon section line roads.

In the Act of July 26, 1866, Congress provided "[t]hat the right of way for the construction of highways over public lands, not reserved for public uses, is granted." Act of July 26, 1866, ch. 262, §8, 14 Stat. 251, 253 (repealed 1976). This provision was an offer of public land for highway purposes that could be accepted by the states in various ways. DeLair v. County of LaMoure, 326 N.W.2d 55, 59 (N.D. 1982). The Dakota Territory accepted the grant by an 1871 law providing that "hereafter all section lines in this Territory shall be and are hereby declared public highways as far as practicable . . ." An Act Regulating the Laying Out of Public Highways, ch. 33, §1, 1870-1871 Laws of Dakota Terr. 519, 519-520 (1871) (codified at ch. 29, §1, 1877 Rev. Code 521, 521).

Once the grant of highways over the public domain was accepted, the public became vested-with an absolute right to use the roads. Small v. Burleigh County, 225 N.W.2d 295, 298 (N.D. 1974); see also Walcott Township of Richland County v. Skauge, 71 N.W.

544, 546 (N.D. 1897). This vested right "'could not be revoked by the general government . . .'" Small v. Burleigh County, 225 N.W.2d at 298, quoting Wenburg v. Gibbs Township, 153 N.W. 440 (N.D. 1915). This right has never been surrendered. Small v. Burleigh County, 225 N.W.2d at 297. Upon vesting of this right, no formal action is necessary by local officials to open a section line road or otherwise declare its status as a public highway. Id. "'Section lines whether traveled or not were already highways by virtue of legislative declaration, and might be traveled and subjected to such use as far as practical . . .'" Id. at 299, quoting Koloen v. Pilot Mound Township, 157 N.W. 672, 673 (N.D. 1916).

Apparently, members of the Lower Yellowstone Irrigation Project argue that the 1866 highway grant and its 1871 acceptance are superseded by an 1890 Act of Congress that says: "In all patents for lands hereafter [after Aug. 30, 1890] taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian . . . there is reserved from the lands in said patent . . . a right of way thereon for ditches or canals constructed by the authority of the United States." 43 U.S.C.S. §945 (1980) (originally enacted at Act of August 30, 1890, ch. 837, §1, 26 Stat. 371, 391).

The essence of the dispute is whether the 1890 grant of a right of way for canals allows for their construction over a highway right of way received by the 1866 grant? Does the 1890 law take precedence over the 1866 law?

That "no" is the correct answer to these questions can be derived from Faxon v. Lallie Civil Township, 163 N.W. 531 (N.D. 1917), appeal dismissed, 250 U.S. 634 (1919) and Minidoka & S.W.R. Co. v. Weymouth, 113 P. 455 (Idaho 1911) .

In Faxon, the township established a public highway on a section line. Faxon, the landowner, claimed compensation for the taking of his land for the road. The township responded that it owed nothing because it had a highway easement by virtue of the 1866 congressional grant and the 1871 acceptance of this grant.

Faxon's land was in the Devils Lake Indian Reservation. The reservation was set apart by an 1874 treaty. Faxon claimed the subsequent setting apart of the land as an Indian Reservation repealed the 1866 grant. But the court said that by 1874 the 1866 act had been in effect eight years and accepted for three years. Faxon v. Lallie Civil Township, 163 N.W. at 533.

> It is also clear that the right granted to the state was not in the nature of a license, revocable at the pleasure of the grantor, but that highways once established over the public domain under and by virtue of the act became vested in the public, who had an absolute right to the use thereof which could not be revoked by the general government .

Id.

The court added that there is nothing in the 1874 treaty that would cause it to believe

Congress intended to divest the public of the highway rights it had granted in 1866. Id. While Congress could set aside public land for a reservation, "the vested [highway] rights could not be taken away." Id.

The analogy between Faxon v. Lallie Civil Township and the problem in McKenzie County is clear. While Faxon is an older case, recently its reasoning was accepted as sound by the Eighth Circuit Court of Appeals. Bird Bear v. McLean County, 513 F.2d 191, 192 (8th Cir. 1975).

The Minidoka & S.W.R. Co. v. Weymouth case also involved a problem like that with which you are faced. In 1902 the Secretary of Interior set aside land for a reclamation project. In 1904 the railroad company built a railroad track across this land. It did so pursuant to Congress' 1875 Railroad Right of Way Act. The Secretary of Interior then built canals for reclamation on the railroad's right of way. Significantly, the Secretary of Interior said the 1890 act authorized him to build the canals. The railroad sought an injunction.

The Secretary of Interior's defense was that the 1890 grant applies to all lands, rights of way, and easements granted by Congress under any law. Minidoka & S.W.R. Co. v. Weymouth, 113 P. at 457. The railroad responded that the 1890 grant of right of way was never intended to apply to a railroad right of way granted under the 1875 act and that to do so would destroy the purposes of the 1875 act. Id. The Idaho court agreed saying Congress only intended the 1890 act to apply to lands the government grants in absolute fee. Id. Congress did not intend for the canal right of way to apply to other congressionally granted rights of way. Id. By analogy, Congress did not intend the 1890 act to allow construction of canals on the highway rights of way it granted North Dakota in 1866.

The Idaho court also noted that statutes are to be construed in such a way as to give meaning and effect to each. Id. at 458. This also led to the conclusion that it was not the intent of the 1890 act to include railroad rights of way within its operation. Id.

We enclose photocopies of the canal right of way laws and trust these and the comments of this letter will be useful to you.

Sincerely,

Nicholas J. Spaeth

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Enclosure