

**N.D.A.G. Letter to Hall (Oct. 27, 1987)**

October 27, 1987

Mr. Nicholas B. Hall  
State's Attorney  
P.O. Box 150  
Grafton, ND 58237

Dear Mr. Hall:

Thank you for your letter of September 2, 1987, wherein you asked whether a township has any responsibility for maintaining or vacating a road that has been deleted from a designated county road system.

In North Dakota, the matter of creating and vacating highways is one that is subject to complete legislative authority. See Morton County v. Forester, 168 N.W. 787, 788 (N.D. 1918). In North Dakota, the abandonment of a highway is the equivalent of a vacation proceeding in that the word "abandonment" means the "cessation of use of right-of-way or activity thereon with no intention to claim or use again for highway purposes." N.D.C.C. § 24-01-01.1(1).

An examination of the provisions of N.D.C.C. title 24, and specifically, chapter 24-05, and N.D.C.C. § 11-11, does not reveal any statutory law whereby the Legislature has delegated the authority to abandon highways to a board of county commissioners. It is noted that N.D.C.C. § 11-11-14(5) makes reference to the vacation of highways, in "the cases provided by law" which in turn is subject to the limitations contained in N.D.C.C. § 24-07-04. The latter section does not authorize the county to abandon its own highway system. Likewise, no case law was found that indicated that the counties could exercise such authority.

N.D.C.C. §§ 24-05-16 and 24-05-17, when read in conjunction with the declaration of legislative intent expressed in N.D.C.C. § 24-01-01, certainly indicate that a board of county commissioners would have the authority to redesignate the county highway system, thereby deleting certain sections of highway from the designated road system. Nonetheless, the problem of the jurisdictional status of the sections of roads removed from the designated county road system remains after the removal has been accomplished. According to your letter, the assumption is that the jurisdictional authority and its attendant responsibility somehow devolves upon the board of township supervisors wherein such portions of the highway may lie.

I cannot find any law that would support your concept that the jurisdiction over such roads automatically inures to the board of township supervisors. Under N.D.C.C. § 24-06-01, a board of township supervisors is charged with the general supervision of the roads, highways, and bridges within the township. However, this office has previously ruled that a

board of township supervisors has the authority to designate a township road system and does have discretion in selecting or designating the roads constituting such system. See 1983 N.D. Op. Att'y Gen. 91. (Copy attached). To give a literal construction to the language in N.D.C.C. § 24-06-01, would mean that a board of township supervisors would be responsible for the maintenance of the interstate highway system, the state highway system, and any other roads that would exist within the township. Such a construction would be contrary to N.D.C.C. § 24-01-01, wherein the Legislative Assembly has recognized that there are different spheres of authority and responsibility for the separate and distinct classes of highway systems that they provided for under N.D.C.C. title 24.

In view of the county's proposal, I am compelled to point out the requirement under N.D.C.C. § 24-05-16, which requires the notice of such changes to the highway commissioner. If the highway being redesignated constitutes a part of the federal-aid secondary road system, it is subject to the regulations contained in 23 C.F.R. pt. 642 (1987) and notice must be given to the Federal Highway Administration (FHWA) of the proposed change. The FHWA at that point could insist that the highway department require the county to maintain the "redesignated" portion of highway under the provisions of 23 U.S.C. § 116(b) (1966), which provides:

In any State wherein the State highway department is without legal authority to maintain a project constructed on the Federal-aid secondary system, or within a municipality, such highway department shall enter into a formal agreement for its maintenance with the appropriate officials of the county or municipality in which such project is located.

If the county refused to properly maintain such section of highway, the Secretary of the U.S. Department of Transportation is empowered to sanction, not only the county, but the entire state, as he deems appropriate, under 23 U.S.C. §116(c). The latter provision states:

If at any time the Secretary shall find that any project constructed under the provisions of this chapter, or constructed under the provisions of prior Acts, is not properly maintained, he shall call such fact to the attention of the State highway department. If, within ninety days after receipt of such notice, said project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the State highway district, municipality, county, or other political or administrative subdivision of the State, or the entire State in which the project is located, whichever the Secretary deems most appropriate, until such project shall have been put in proper condition of maintenance."

Given the situation you presented, the utterances of the supreme court in 1918 as made in Forester, at 789, are more appropriate today than ever.

The policy of the Legislature, as evinced by these different statutes, was to delegate and intrust the power to open, vacate, and change highways within the different organized villages, cities, and townships to their governing

bodies, and to restrict the power of the county commissioners to highways lying within territory not organized into local governmental subdivisions. The wisdom of this policy may be questioned, but that is a matter for the Legislature, and not for the courts;

(Emphasis supplied)

The statutory law remains today as it was on December 26, 1986, the date of my response to Mr. Robert C. Hoy, Cass County State's Attorney, on a similar matter. (Copy attached.) Given the lack of any statutory change, coupled with the potential sanction the state or its political subdivisions may incur, I can find no basis to deviate from the position expressed in my response to Mr. Hoy.

Sincerely,

Nicholas J. Spaeth

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Enclosure