

Date Issued: July 13, 1981 (AGO 81-75)

Requested by: Owen K. Mehrer,
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- QUESTIONS PRESENTED -

I.

Whether a petition, as set forth in section 24-07-05 and 24-07-09 of the North Dakota Century Code, must be presented to a board of county commissioners before the issues of the location of a fence in relation to a section line right-of-way or the location or movement of a section line road are properly before it for consideration.

II.

Whether a board of county commissioners must order an individual to remove his fence under section 24-07-03 or section 24-06-28, N.D.C.C., when no survey has been conducted to determine the location of the section line.

III.

Whether a board of county commissioners has an obligation to pay the expense of a survey in order to determine the lawful location of a disputed section line.

IV.

Whether section 24-07-01, N.D.C.C., applies to a presently established section line road, thus establishing it as the section line in a disputed area.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a petition brought under sections 24-07-05 and 24-07-09, N.D.C.C., will not bring the matter of the location of a fence in relation to a section line right-of-way before a board of county commissioners. It is my further opinion that the matter of the location or movement of a section line road will be brought before the board only if the petition requests that the road deviate from the actual section line.

II.

It is my opinion that a board of county commissioners has no authority under sections 24-07-03 and 24-06-28, N.D.C.C., to order the removal of fence from a section line right-of-way even if a survey has been conducted to determine the location of a section line.

III.

It is my opinion that it is not the obligation of the county to fund a survey when the location of a section line is in dispute.

IV.

It is my opinion that while section 24-07-01, N.D.C.C., may, depending on the facts, establish a road, it will not change the position of the section line right-of-way, and that unless the board of county commissioners, through proper procedures, establishes a road which deviates from the actual section line, the actual section line will remain open for public travel.

- ANALYSIS -

I.

Sections 24-07-05 and 24-07-09, N.D.C.C., deal with laying out, altering, or discontinuing roads and posting of copies of the petition to lay out, alter or discontinue a road. There is no mention in these sections of fence location in relationship to a section line right-of-way.

In Small v. Burleigh County, 225 N.W.2d. 295 (N.D. 1974), the court stated:

"We hold that congressional section lines outside the limits of incorporated cities, unless closed by proceedings permitted by statute, are open for public travel without the necessity of any prior action by a board of township supervisors or county commissioners."

Since section line roads are on section lines and are open for public travel without the necessity of any action by the board of county commissioners, a petition under sections 24-07-05 and 24-07-09, N.D.C.C., is to be used only when a road is desired that will not be on a section line or when a nonsection line road is to be discontinued.

II.

Section 24-07-03, N.D.C.C., provides, in part:

". . . the congressional section lines shall be considered public roads, to be opened to the width of two rods 10.06 meters on each side of such section lines, where the same have not been opened already upon the order of the board having jurisdiction, without any survey being had, except where it may be necessary on account of variations caused by natural obstacles . . ."

Section 24-06-28, N.D.C.C., prohibits a person from obstructing any section line by placing or causing to be placed "any permanent obstruction, stones, or rubbish within thirty-three feet 10.06 meters of any section line . . ."

Section 24-06-29, N.D.C.C., relating to removal of obstructions when section lines opened, section 24-06-03, N.D.C.C., relating to removal of fences from section lines, and section 24-06-28, N.D.C.C., are applicable to sections lines over which travel is impossible because of terrain or natural barriers and upon which the county or township subsequently builds a public road. These sections were enacted subsequent to section 24-07-03, N.D.C.C. Since the enactment of section 24-07-03, N.D.C.C., involved the acceptance of a federal grant, the Legislature could not alter such acceptance by subsequent legislation.

The North Dakota Supreme Court in Small v. Burleigh County, 225 N.W.2d. 295, 300, noted with apparent approval:

"The Attorney General also gave his opinion that sections 24-06-28, 24-06-29, and 24-06-30, N.D.C.C., are applicable to section lines over which travel is impossible because of terrain or natural barriers."

III.

Section 24-06-28, N.D.C.C., prohibits the obstruction of a section line right-of-way. The section line exists and if the adjoining landowners question where their fence or fields should be located in relation to the right-of-way of a section line, it is their responsibility to determine the extent of that right-of-way so that they will not be in violation of the law. It is not the obligation of the county to fund a survey when the location of a section line is in dispute. If it is determined that an individual may be in violation of the law and obstructing a section line, the state's attorney may desire to have a survey done to establish the exact location of the section line and section line right-of-way in order to determine whether a violation has in fact occurred and whether to initiate a prosecution of the individuals responsible for the violation.

The overseer of highways has authority to remove obstructions from highways. Section 24-06-31, N.D.C.C., relating to obstructions in highways, provides:

"Each overseer of highways having personal knowledge, or being notified in writing, of any obstruction in the highway or public street in his district, immediately shall remove or cause any such obstruction to be removed."

A section line is open for travel for two rods on either side of a section line without an order of a board of county commissioners. (See section 24-07-03, N.D.C.C., and Small v. Burleigh County supra.) There was, at one time, a survey conducted to establish the location of the section line. It is the landowner's responsibility to make sure that he does not encroach upon that right of way. If a person does obstruct a section line, he may be subject to prosecution.

IV.

Section 24-07-01, N.D.C.C., relates to establishing public roads by prescription. This section will not change the location of a section line right-of-way. What could result, if a section line road deviates outside of a distance of two rods from the section line, is that the area outside of the actual section line right-of-way may be considered a public road. Unless the board of county commissioners has acted under section 24-07-03, N.D.C.C., to establish a road by survey around natural obstacles, the actual right-of-way of the section line right-of-way will not be altered. Therefore, a road may be established under section 24-07-01, N.D.C.C., but unless the board of county commissioners has proceeded to establish that as the section line road, the right-of-way on either side of the actual section line will not be diminished.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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