

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-02

Date issued: January 6, 2000

Requested by: Terence Devine, Nelson County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether the public may travel any place within the statutory section line right of way regardless of how the land is used by the landowner.

II.

Whether a person is subject to criminal prosecution if, while traveling on an unimproved section line right of way over property which the person does not own, that person tramples, plows, or cultivates crops lawfully planted by the landowner beyond what is necessary to travel the section line.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the public's right to travel a section line right of way coexists with the property rights of landowners holding title to the right of way, and that the public's right to travel on an unimproved section line does not include the right to damage the property belonging to the landowners except as reasonably necessary to travel the section line.

II.

It is my opinion that the right to travel on an unimproved section line right of way does not include a traveler's taking actions other than traveling, and a traveler who willfully damages the tangible property of another by plowing, cultivating, or unnecessarily trampling crops planted by the landowner may be charged with criminal mischief under N.D.C.C. § 12.1-21-05. It is my further opinion that an injunction to abate a nuisance may be pursued under N.D.C.C. ch. 42-02, and that this may be a more appropriate approach than a criminal action under certain circumstances.

- ANALYSES -

I.

The United States offered easements for travel on section lines to the Dakota Territory in 1866, an offer which was accepted and has not been surrendered. See Ames v. Rose Township Bd. of Township Supervisors, 502 N.W.2d 845, 847 (N.D. 1993), Lalim v. Williams County, 105 N.W.2d 339, 344 (N.D. 1960). The congressional section lines are public roads in all townships of this state outside the limits of incorporated cities and outside platted and duly recorded townsites, additions, or subdivisions, and are open for travel to the width of 33 feet on each side of the section line. N.D.C.C. § 24-07-03. Congressional section lines outside the limits imposed by N.D.C.C. § 24-07-03, unless closed by proceedings permitted by statute, are open for public travel without the necessity of any prior action by a governmental agency, even if the easement has not been improved or surfaced. See Small v. Burleigh County, 225 N.W.2d 295, 300 (N.D. 1974).

However, there are competing interests regarding use of land within section line easements. "A landowner abutting an open section line retains ownership of the property within the easement, subject to the public's right to travel." Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994), citing Small, 225 N.W.2d at 297. See also Hjeloe v. J. C. Snyder & Sons, 133 N.W.2d 625, 629 (N.D. 1965) (adjacent landowner retains ownership within highway easement), Lalim, 105 N.W.2d at 344 (same). "The public's easement is limited to the right to travel" Water Resource Dist., 510 N.W.2d at 628. As an example, a landowner has statutory permission to plow and cultivate within the section line easement, but the landowner must expect some crop damage in the path of usual travel and must be careful not to plant a crop which would grow to such size that it would impede the usual travel on a section line. State v. Brossart, 565 N.W.2d 752, 758 n.3 (N.D. 1997).

In Water Resource Dist., the Supreme Court held that a county commission had authority to approve placement of a permanent obstruction within a section line easement, specifically a home which was later discovered to extend 7 feet into the public right-of-way on an open section line. The Court stated:

The public's easement is limited to the right to travel, and does not include an absolute right to an object-free zone for the complete length and width of the section line. In Hjelle [v. J.C. Snyder & Sons], 133 N.W.2d 625 (N.D. 1965)], we held that highway right-of-way is not

"obstructed" when a placement did not impede the public's right of passage. 133 N.W.2d at 630. We recently held that cattle guards or gateways do not have to be sixty-six feet wide to comply with NDCC 24-07-03, when approved by the board. Ames v. Rose Township Board of Township Supervisors, 502 N.W.2d 845, 850 (N.D. 1993). Only when an obstruction effectively deprives the public of the ability to travel on an open section line is their right to travel violated.

Water Resource Dist., 510 N.W.2d at 628. It may be inferred that when the law or a governmental body lawfully authorizes an obstruction of a highway, including a section line easement, then travelers on the section line easement may not interfere with the permitted activity or obstruction.

The right of the public to travel on a section line easement does not appear to be different than the right of the public to travel upon any highway or public road in this state. In determining that the state may lawfully condition driving a motor vehicle on the highways by requiring such drivers to obtain a license from the state, the court held:

The use of the public highways is not an absolute right which everyone has, and of which a person cannot be deprived; it is instead a privilege which a person enjoys subject to the control of the State in its valid exercise of its police power.

State v. Kouba, 319 N.W.2d 161, 163 (N.D. 1982). Therefore, the regulation of a person's activities while traveling on public ways is permissible under the police power of the state.

"Persons using a highway must exercise ordinary care to avoid injury to the owners of abutting property, but are not liable for injuries caused to such owners as the consequence of a lawful and non-negligent use of the way." 39 Am. Jur. 2d Highways, Streets, and Bridges § 213 (1999). There is no cause of action against an individual using a public way for travel in conformance with the rules governing its use. Id. In some instances, the Legislature has regulated the competing balance between landowners and travelers who would use the section line easements. For example, landowners may construct fences across section lines if the landowner also constructs a cattle guard and gateway at the section line which meets the approval and specifications of the board of county commissioners or board of township supervisors having jurisdiction over the section line involved. N.D.C.C. §§ 24-06-28 and 24-10-02. A traveler who

damages any fence or who opens and fails to close any gate constructed in the fence along the section line is guilty of an infraction. N.D.C.C. § 24-06-28(3).

A case interpreting the statutes governing cattle guards and gateways on section lines helps to demonstrate what the right to travel on unimproved section lines means under the law. Cattle guards and gateways are required at every point where a fence crosses a section line in order to permit the free movement of vehicles over cattle guards and permitting bypass of the cattle guard for livestock or equipment movement through the gateway. Ames v. Rose Tp. Bd. of Tp. Supervisors, 502 N.W.2d 845, 850 (N.D. 1993). The Legislature left the size of the gateways and cattle guards to be determined by the appropriate board in the exercise of its discretion. Id. at 851. The cattle guards are to be constructed to permit motor vehicles to pass, such as automobiles and pick up trucks. Id. at 850-851. The gateways must be able to be opened and closed easily by the public, but their specific width is within the board's discretion. Id. 851. In so holding, the Supreme Court specifically rejected an argument requiring free and unrestricted access across the entire 66 feet of the easement because the easement is 66 feet wide. Id. at 850.

Therefore, it is my opinion that the public's right to travel a section line right of way coexists with the property rights of landowners holding title to the right of way, and that the public's right to travel on an unimproved section line does not include the right to damage the property belonging to the landowners, except as is reasonably necessary to travel the section line.

II.

Damaging a farmer's crops by driving a vehicle over them may constitute the crime of criminal mischief. State v. Erdman, 422 N.W.2d 808, 812-813 (N.D. 1988). A person is guilty of committing criminal mischief if that person willfully tampers with tangible property of another so as to endanger person or property, or if that person willfully damages tangible property of another. N.D.C.C. § 12.1-21-05(1). Although the matter ultimately would be a question of fact for a jury, plowing or cultivating crops belonging to another without the owner's permission could reasonably be found to be damaging to those crops just as driving an automobile through a crop field was found to be damaging to crops. Erdman, 422 N.W.2d at 812.

A landowner has ownership of the land within a section line easement, and has statutory authority to plow and cultivate within that easement with the expectation that some crop damage may occur in the path of usual travel. See State v. Brossart, 565 N.W.2d 752, 757,

758 n.3 (N.D. 1997). While a traveler necessarily may have to trample the landowner's crops in order to travel, the traveler has a duty to exercise ordinary care when traveling the section line. See DeLair v. LaMoure County, 326 N.W.2d 55, 62 (N.D. 1982) (driver must exercise ordinary care). A traveler who willfully damages crops beyond the damage necessary to travel the section line may be committing criminal mischief. As an example, an individual who willfully drives the length and breadth of a lawfully cultivated section line easement in order to spite the landowner by destroying the crops and not simply to pass through the area may be charged under N.D.C.C. § 12.1-21-05.

However, care must be taken when pursuing a criminal action to determine whether a civil action may be more appropriate. The North Dakota Supreme Court reversed a conviction for obstructing a public road where there was a legitimate dispute whether the necessary requirements were met to create the public road by prescription. State v. Meyer, 361 N.W.2d 221, 222 (N.D. 1985). Similarly, a criminal conviction for theft of crops was reversed where there was a legitimate dispute over ownership of the crops. State v. Brakke, 474 N.W.2d 878, 882 (N.D. 1991). If, after investigation, the facts do not demonstrate that a traveler willfully destroyed a landowner's crops beyond that necessarily entailed by traveling an unimproved section line while exercising ordinary care, no criminal action may be warranted. However, a civil action to enjoin a public nuisance under N.D.C.C. ch. 42-02 may be pursued if the facts and circumstances warrant such action. This approach would clearly delineate the scope of permitted travel and is enforceable through contempt proceedings. N.D.C.C. § 42-02-10.

Therefore, it is my opinion that the right to travel on an unimproved section line right of way does not permit a traveler to take actions other than travelling across the section line right of way, and if the traveler willfully damages tangible property of another by plowing, cultivating, or unnecessarily trampling crops planted by the landowner, the traveler may be charged with criminal mischief under N.D.C.C. § 12.1-21-05. It is my further opinion that an injunction to abate a nuisance may be pursued under N.D.C.C. ch. 42-02, and that this may be a more appropriate approach than a criminal action under certain circumstances.

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- EFFECT -

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

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