

**LETTER OPINION
2002-L-34**

June 7, 2002

Honorable Francis J. Wald
State Representative
433 7th St E
Dickinson, ND 58601-4525

Dear Representative Wald:

Thank you for your letter regarding hunting on county road rights-of-way. You ask whether the use of federal funds for the construction or reconstruction of county roads and rights-of-way negates the position of the North Dakota Game and Fish Department that persons owning land adjoining these roads can close them to hunting.

The Game and Fish Department's "position" referred to in your letter is expressed in various hunting guides published by the Department. For example, the 2001-2002 Small Game & Furbearer Guide provides:

Road Rights of Way – Do not hunt on road rights of way unless you are certain that they are open to public use. Most road rights of way are under the control of the adjacent landowner and are closed to hunting when the adjacent land is posted closed to hunting.

N.D. Game and Fish Department, 2001-2002 Small Game & Furbearer Guide, Effective August 11, 2001 - August 31, 2002. See also N.D. Game and Fish Department, 2001 Waterfowl Hunting Guide; N.D. Game and Fish Department, 2001 Deer Hunting Guide.

The Department's "position" is derived primarily from North Dakota Supreme Court case law and opinions from this office.¹ In Rutten v. Wood, 57 N.W.2d 112 (N.D. 1953),

¹ This office has previously addressed the issue of whether hunting may be permitted on a roadway when the landowners on each side of that roadway have posted "no hunting" signs pursuant to N.D.C.C. §20.1-01-17. See Letter from Attorney General Nicholas Spaeth to Bruce Haskell (Aug. 10, 1988); Letter from Assistant Attorney General Robert Bennett to Dominic Volesky (Mar. 22, 1988); Letter from Attorney

Rutten owned the land on each side of a section line highway and had posted no hunting signs on both sides. Id. at 112. Rutten sought to enjoin Wood from parking his car along the right-of-way and shooting geese as they flew across the highway. Id. at 112-113. In ruling for the plaintiff landowner, the North Dakota Supreme Court expressed the rule in this state as to fee title to highways:

In the absence of a statute expressly providing for the acquisition of the fee, or of a deed from the owner expressly conveying the fee, when a highway is established by dedication or prescription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner.

Id. at 113 (quoting 25 Am.Jur. Highways § 132). See also Lalim v. Williams Co., 105 N.W.2d 339, 345 (N.D. 1960); Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599, 604 (N.D. 1942); Donovan v. Alert, 91 N.W. 441 (N.D. 1902); 39 Am.Jur.2d Highways, Streets, and Bridges § 183 (1998).

The North Dakota Supreme Court held that where the fee owner of land contiguous to both sides of a highway posted “no hunting” signs on both sides of that highway, a hunter was not entitled to hunt wild game on the right-of-way as an incident to the right to travel. Rutten at 115.

As pointed out in Rutten and in the Department’s policy, there may be instances where the state or a county holds fee title to the roadway and ditches, rather than merely a right-of-way. See N.D.C.C. §§ 24-01-18, 24-01-32, 32-15-03. If the state or county has properly acquired fee title to the land underlying the roadway and ditches, the “no hunting” prohibition by the adjacent landowner would not extend to the roadway and ditches owned in fee by the state or county.

Rutten v. Wood, and the earlier opinions by this office, did not address whether roads constructed or reconstructed, either wholly or partially, with federal funds would change the outcome under North Dakota law. I have reviewed the federal laws regarding funding of local roads. Nothing in federal law suggests that the use of federal funding for county roads would result in the roadway and ditches being open to hunting.

Thus, it is my opinion that the acceptance of federal aid for the acquisition, construction, or reconstruction of county roads and rights-of-way does not affect North Dakota law. The rule announced in Rutten v. Wood allowing adjacent landowners to close county rights-of-way to hunting by posting their land applies even where the right-of-way was acquired, constructed, or reconstructed with federal funds. This opinion is limited to

General Allen Olson to Russel Stuart (Sept. 12, 1974). I have enclosed copies of those three opinions for your information.

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those situations where the public authority has only been granted a right-of-way or easement for a roadway. If the state or county has properly acquired fee title to the land underlying the roadway and ditches, the adjoining landowner's posting of the adjoining property pursuant to N.D.C.C. § 20.1-01-17 would not preclude the public from hunting in the ditches along roadways held in fee by the state or county.

Sincerely,

Wayne Stenehjem
Attorney General

pcg/vkk
Enclosures