STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-05

Date issued: January 26, 2000

Requested by: Dennis Edward Johnson, McKenzie County State's Attorney

- QUESTION PRESENTED -

Whether federal land in North Dakota can be burdened by public roads established by prescription under state law and by the state's section line law.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that federal land in North Dakota can be burdened by public roads established by prescription under state law and by the state's section line law.

- ANALYSIS -

Background

In 1866 Congress enacted a statute giving the public a right-of-way on federal land that had not been reserved for a particular use. The statute stated: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Ch. 262, § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932). The law became known as "R.S. 2477" because it was originally codified at section 2477 of the 1873-74 Revised Statutes.

The grant was repealed in 1976 by the Federal Land Policy Management Act (FLPMA), which set a new direction for public land management. Pub. L. 94-579, 90 Stat. 2743, 2793 (1976). Congress, however, preserved R.S. 2477 rights-of-way in existence on the date of FLPMA's passage. Secs. 509(a) (codified at 43 U.S.C. § 1769(a)), 701(a)(h). Thus, the question becomes whether North Dakota law establishing public roads properly accepted Congress's offer before it was withdrawn in 1976.

In North Dakota public roads can be established by prescription, that is, by continued public use. A significant body of case law addresses the creation of public roads by statutory prescription and by prescription under the common law. E.g., Hartlieb v. Sawyer Tp. Bd., 366 N.W.2d 486 (N.D. 1985); Kritzberger v. Traill County, 242 N.W. 913 (N.D. 1932); Berger v. Morton County, 221 N.W. 270 (N.D. 1928); Burleigh County v. Rhud, 136 N.W. 1082 (N.D. 1912); Walcott Tp. v. Skauge, 71 N.W. 544 (N.D. 1897). The law is codified at N.D.C.C. § 24-07-01.

State law also establishes all section lines as public roads, which is a subject that has also often been addressed by the courts. E.g., Ames v. Rose Tp., 502 N.W.2d 845, 847-

48 (N.D. 1993); Small v. Burleigh County, 225 N.W.2d 295, 297 (N.D. 1974); Huffman v. Bd. of Supervisors, 182 N.W. 459, 461 (N.D. 1921). Section lines comprise "a system of highways," Huffman, 182 N.W. at 461, over which the public has a "vested" and "absolute right" to travel. Walcott Tp., 71 N.W. at 546. A section line is considered a highway and open for travel without the need for any governmental action. State v. Silseth, 399 N.W.2d 868, 869 (N.D. 1987); Small, 225 N.W.2d at 300; Huffman, 182 N.W. at 461. The section line access law is codified at N.D.C.C. § 24-07-03.

Both prescriptive roads and section line roads are considered, by the North Dakota Supreme Court, an appropriate means by which the offer of R.S. 2477 might be accepted. Huffman, 182 N.W. at 461; Walcott Tp., 71 N.W. at 545-46. But the federal government wasn't a party to such cases. So a definitive answer to the question whether state law properly accepted the R.S. 2477 grant remains.

The grant has recently generated a nationwide controversy. As a result, in 1993 the Department of Interior, at Congress's direction, issued a study of the R.S. 2477 grant.[1] Also in 1993, Congress's own research service issued a report.[2] Many law review articles discuss and debate R.S. 2477.[3] And as will be discussed, in the 1980s and 1990s the nature of R.S. 2477 was litigated.

Part of the controversy is due to the importance of roads to the infrastructure of the states. Indeed, R.S. 2477 roads "are major components of the transportation systems in most western states." Sierra Club v. Hodel, 848 F.2d 1068, 1082 (10th Cir. 1988), overruled in part on other grounds, Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

It is in North Dakota's western counties where the need for roads confronts extensive federal land ownership. The Bureau of Land Management oversees some of this land but most of it is managed by the Forest Service as part of the Little Missouri River National Grasslands. Unfortunately, federal land managers sometimes view the need

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[1] U.S. Dep't of Interior, "Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands" (1993).

[2] Pamela Baldwin, "Highway Rights of Way: The Controversy Over Claims Under R.S. 2477," Cong. Res. Serv. Rpt. 93-74A (1993).

[3] E.g., Barbara G. Hjelle, "Ten Essential Points Concerning R.S. 2477 Rights-Of-Way," 14 J. Energy Nat. Resources & Envtl. L. 301 (1994); William J. Lockhart, "Federal Statutory Grants are not Placeholders for Manipulated State Law: A Response to Ms. Hjelle," 14 J. Energy Nat. Resources & Envtl. L. 323 (1994); Barbara G. Hjelle, "Reply to Mr. Lockhart: An Explanation of R.S. 2477 Precedent," 14 J. Energy Nat. Resources & Envtl. L. 349 (1994); Harry Bader, "Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis," 11 Pace Envtl. L. Rev. 485 (1994).

and even the existence of public roads across federal land differently than local officials, as is apparently the case in McKenzie County.

Resolution of the dispute requires determining the role of state law in defining the 1866 grant. Indeed, this is the essence of the R.S. 2477 controversy nationwide. Sierra Club, 848 F.2d at 1080. In particular, the controversy concerns the meaning of that part of the grant providing "for the construction of highways." What is unclear is whether this requires the actual construction of a highway, or if a highway may be created merely by prescription or statutory declaration.

Because R.S. 2477 is a federal statute, federal law must interpret it. United States v. Gates of the Mts. Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984). But state law can be adopted or borrowed to provide the rules of decision. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979). Kimbell Foods sets forth several factors to be considered when deciding whether state law should govern. Id. at 728-29. To fully apply these factors, however, several matters affect the Kimbell Foods analysis and require review.

State court decisions have always applied state law

Many state courts have considered how the 1866 grant may be perfected. These decisions uniformly find that state law governs. Barbara G. Hjelle, "Ten Essential Points Concerning R.S. 2477 Rights-Of-Way," 14 J. Energy Nat. Resources & Envtl. L. 301, 307 (1994). For example, a California court stated that an R.S. 2477 road is to be "established in accordance with the laws of the state in which it was located." Ball v. Stephens, 158 P.2d 207, 209 (Cal. Ct. App. 1945). This is, of course, the view of the North Dakota Supreme Court. E.g., Koloen v. Pilot Mound Tp., 157 N.W. 672, 674-75 (N.D. 1916). Many other state courts have made similar rulings. E.g., State v. Crawford, 441 P.2d 586, 590 (Ariz. 1968); Lovelace v. Hightower, 168 P.2d 864, 867 (N.M. 1946); Kirk v. Schultz, 119 P.2d 266, 268 (Idaho 1941); Moulton v. Irish, 218 P. 1053, 1054 (Mont. 1923); Wallowa County v. Wade, 72 P. 793, 794-95 (Or. 1903); Smith v. Mitchell, 58 P. 667, 668 (Wash. 1899).

Thus, "[o]ver the past 125 years, each western state has developed its own state-based definition of the perfection or scope of the R.S. 2477 grant." Sierra Club, 848 F.2d at 1082. None of these state decisions, however, have the federal government as a party or purport to adjudicate a federal property interest. William J. Lockhart, "Federal Statutory Grants are not Placeholders for Manipulated State Law: A Response to Ms. Hjelle," 14 J. Energy Nat. Resources & Envtl. L. 323, 326 (1994). They typically involve disputes between private parties or between a landowner and local government. Id. While state decisions may not be direct precedent, they nonetheless provide a long, consistent, and well-developed state jurisprudence that is a backdrop to any study of R.S. 2477.

Department of Interior rules and decisions have often applied state law

Only recently has the federal government taken the view that state law does not define R.S. 2477. In 1938 a Department of Interior regulation stated that R.S. 2477 grants are perfected "upon the construction or establishing of highways, in accordance with the State laws." 56 Interior Dec. 533, 551 § 55 (1938). This rule was codified as 43 C.F.R. § 244.55 (1939). Sierra Club, 848 F.2d at 1080. The rule was periodically redesignated but remained a part of the Code of Federal Regulations until 1980.[4]

Thus, for a considerable part of the 1900s federal law specifically allowed for not just the "construction" of R.S. 2477 roads in accordance with state law, but also for "establishing" them under state law. The Tenth Circuit analyzed the issue and stated that "federal regulations heavily support a state law definition." Sierra Club, 848 F.2d at 1080. This is significant because of the important role agency interpretation plays in construing statutes. Id.

Federal regulations were not the only way in which the Department of Interior articulated its historical recognition of state law primacy. In 1955, a Department of Interior legal opinion stated:

> Section 2477 is an unequivocal grant of the right-of-way for highways over the public lands without any limitation as to the manner of their establishment. The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located . . . . Whatever may be construed as a highway under State law is a highway under Rev. Stat. sec. 2477 . . . .

62 Interior Dec. 158, 161 (1955) (interior citations omitted).

In addition, decisions of the Interior Board of Land Appeals state that R.S. 2477 roads are to be established under state law. Leo Titus, Sr., 92 Interior Dec. 578, 586 (1985); Homer D. Meeds, 83 Interior Dec. 315, 320-21 (1976). Leo Titus cites another Interior Department decision, Alfred E. Koenig, A-30139 (Nov. 25, 1964), that also concluded that state law governs. Leo Titus, Sr., 92 Interior Dec. at 586-87. Finally, in litigation the federal government has stipulated that R.S. 2477 "is applied by reference to state law to determine when the offer of grant has been accepted." Wilkenson v. Dep't of Interior, 634 F.Supp. 1265, 1272 (D. Colo. 1986).

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[4] The second and final redesignation occurred in 1970 when the section was redesignated Sec. 2822.2-1. 35 Fed. Reg. 9503, 9647 (1970).

The federal government's public positions, however, have not been entirely consistent. The Secretary of the Interior in 1898 ruled that a county in Washington did not have complete discretion to establish an R.S. 2477 road. Douglas County, Washington, 26 Pub. Lands Dec. 446, 447 (1898).

But, as noted, opinions and decisions in the 1950s, 60s, 70s, and 80s from federal officials state that R.S. 2477 is to be interpreted under state law. This, coupled with the federal regulation enacted in 1938, solidly supports the view that until only recently the federal government acknowledged the primacy of state law. Consequently, the Tenth Circuit appears to have been well justified in concluding that the argument against application of state law "clearly conflicts with more than four decades of agency precedent." Sierra Club, 848 F.2d at 1081.

Federal court decisions apply state law

Federal court decisions are the third pillar supporting the role of state law in construing R.S. 2477. The primary federal decision is Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988). The court considered a dispute over Garfield County's plan to improve a road across federal land. The county wanted to improve Burr Trail from a one-lane dirt road to a two-lane graveled road. Id. at 1073. The Sierra Club argued that this would exceed the scope of the right-of-way acquired under R.S. 2477. Id. at 1079. The court had to decide whether state law defined the scope of the right-of-way. Id. at 1080. In light of "the weight of federal regulations, state court precedent, and tacit congressional acquiescence," the court ruled that state law defines the scope of an R.S. 2477 right-of-way. Id. at 1083.

The issue in McKenzie County is whether public roads have been properly established as R.S. 2477 rights-of-way. The issue of the establishment of a right-of-way differs from determining the scope of a right-of-way. Id. at 1082 n.13. The analysis used in Sierra Club, though applied to defining the scope of the right-of-way, is nonetheless equally applicable to defining the existence of the right-of-way. Indeed, in a later proceeding involving the Burr Trail, a different Tenth Circuit panel stated that the use of Utah law to "determine the existence and scope of the right-of-way" was correct. Sierra Club v. Lujan, 949 F.2d 362, 365 (10th Cir. 1991) (emphasis added).

The Court of Appeals in Hodel is not the only federal court to recognize the primacy of state law in interpreting R.S. 2477. The lower court in the Burr Trail dispute held that the right-of-way could be established "under terms provided by state law." Sierra Club v. Hodel, 675 F.Supp. 594, 604 (D. Utah 1987).

A district court in Colorado has twice stated that "[w]hether and when the offer of grant is accepted by the public are questions resolved by state law." Barker v. Bd. of County

Comm'rs, 49 F.Supp.2d 1203, 1214 (D. Colo. 1999); Barker v. Bd. of County Comm'rs, 24 F.Supp.2d 1120, 1127 (D. Colo. 1998). Two other district courts have ruled that state law governs perfection of the R.S. 2477 grant. United States v. Jenks, 804 F.Supp. 232, 235 (D.N.M. 1992), aff'd in part and rev'd in part on other grounds, 22 F.3d 1513 (10th Cir. 1994); Adams v. United States, 687 F.Supp. 1479, 1490 (D. Nev. 1988), aff'd in part and rev'd in part on other grounds, 3 F.3d 1254 (9th Cir. 1993); see also Wilderness Soc'y v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973).

Other federal courts have also noted, though in dicta, that state law governs the grant. Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974); United States v. Pruden, 172 F.2d 503, 505 (10th Cir. 1949). And as mentioned, in Wilkenson v. Dep't of Interior, 634 F.Supp. at 1272, the court applied state law because the parties, one of whom was the United States, agreed that acceptance of the right-of-way grant is governed by state law. But see United States v. Gates of the Mts. Lakeshore Homes, Inc., 565 F.Supp. 788, 791-92 (D. Mont. 1983) (in dicta stating that federal law, not state law, governs acceptance of an R.S. 2477 grant), rev'd on other grounds, 732 F.2d 1411 (9th Cir. 1984).

Finally, Shultz v. Dep't of Army, 10 F.3d 649 (9th Cir. 1993), also found that "[w]hether a right of way has been established is a question of state law." Id. at 655. But three years later the three-member panel in Shultz, with one dissent, withdrew its decision. Shultz v. Dep't of Army, 96 F.3d 1222 (9th Cir. 1996). The withdrawal was based on the court's reexamination of a factual issue and not on a reevaluation of the law. Id. at 1223. While the case may no longer have precedential value, it nonetheless shows that an assertion of states' rights is sound. Indeed, the weight of federal case law supports using state law to define the R.S. 2477 grant.

Congress has acquiesced in the role of state law

Congress did not object when the states developed their understanding of R.S. 2477. It did not object when the Department of Interior for decades in regulations, opinions, and administrative decisions deferred to state law. It has not enacted legislation overturning federal decisions that rely on state law. Such acquiescence contributed to the Tenth Circuit's finding that state law governs interpretation of R.S. 2477. Sierra Club, 848 F.2d at 1083.

Additional congressional acquiescence can be found in the origins of North Dakota's section line law. Section lines have been public highways since territorial days. Act of January 12, 1871, Dak. Terr. Leg. 1870-71, ch. 33, 519-20 (codified at 1877 Dak. Terr. Rev. Code Ch. 29, § 1). The territorial statute accepted the R.S. 2477 grant. Ames v. Rose Tp., 502 N.W.2d 845, 847 (N.D. 1993); Small v. Burleigh County, 225 N.W.2d 295, 296-97 (N.D. 1974).

Territorial acceptance is significant because Congress had "the entire dominion and sovereignty" over Dakota Territory. Simms v. Simms, 175 U.S. 162, 168 (1899). It had "full and complete legislative authority over the people of the territories and all the departments of the territorial governments." First Nat'l Bank v. Yankton County, 101 U.S. 129, 133 (1879).

Congress could have governed Dakota Territory directly. State v. Houge, 271 N.W. 677, 679 (N.D. 1937). Congress even had the power to alter or annul acts of the Territorial Legislature. See Hornbuckle v. Toombs, 85 U.S. 648, 655 (1873); Clinton v. Englebrecht, 80 U.S. 434, 445 (1871). In fact, on at least one occasion, Congress did annul an act of the Dakota Territorial Legislature. First Nat'l Bank v. Yankton County, 101 U.S. at 131.

But Congress did not modify or annul the Territorial Legislature's 1871 law making section lines public highways. It let stand and acquiesced in this assertion of local authority over the public domain. This 1871 Act, coming so soon after the 1866 grant, is evidence that Congress intended the 1866 grant to be perfected as the people settling the frontier thought best.[5]

The Bankhead-Jones Act preserves public roads

Most of the federal land in western North Dakota was once patented into private ownership and reacquired under federal land programs of the mid-1930s that ripened into the Bankhead-Jones Act of 1937. Agric. Law/Economics Research Prog., "Can North Dakota Grazing Survive a Wilderness or Wild and Scenic Designation – Are There Cattle in Nature?," 70 N.D. Law Rev. 509, 523-24 (1994). Although all the land may not have been acquired under the Bankhead-Jones Act, by rule and executive order, management of this land is still subject to the Act. 36 C.F.R. § 213.1(b) (1999); Exec. Order No. 7908, 3 C.F.R. §§ 336, 337 (1938-1943).

This is important because Title III of the Bankhead-Jones Act states that acquisitions under it are "subject to any reservations, outstanding estates, interests, easements, or other encumbrances which the Secretary determines will not interfere with the utilization of such property for the purposes of this title." 50 Stat. 522, 526 (1937). This broad language includes public roads. Nothing indicates that at the time of the acquisitions the federal government objected to the state's section line access law or the presence of other roads. Indeed, federal law states that "[e]xisting valid rights . . . affecting these lands shall continue in full force and effect." 36 C.F.R. § 213.3(b) (1999).

[5] At least one territorial court has ruled that R.S. 2477 is properly accepted in accordance with local law. Clark v. Taylor, 1938 WL 1184, *3, 9 Alaska 298, 305 (D. Alaska Terr. 1938).

In fact, according to McKenzie County, federal title to much of the land was reacquired or confirmed in condemnation actions, the judgments of which make federal title "'subject to . . . all existing public roads . . . and rights of way, as now located on and/or across'" the land. Letter from McKenzie County State's Attorney Dennis Edward Johnson to Assistant Attorney General Charles Carvell (Dec. 23, 1999) (quoting United States v. 4,069.72 Acres, No. 1080, Order for Jdgmt. at 10 (D.N.D. Oct. 31, 1939); United States v. 560 Acres, No. 1076, Jdgmt. at 5 (D.N.D. Mar. 18, 1939). Thus, a federal district court has ordered the federal government to accept the presence of public roads on these lands.

Under Kimbell Foods state law governs interpretation of R.S. 2477

As mentioned, state law can be adopted by federal courts to resolve federal issues. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979). In choosing between a uniform national rule and adopting state law, three factors are considered: (1) whether a nationally uniform law is needed; (2) whether application of state law would frustrate federal policy; and (3) whether a federal rule would disrupt existing relationships under state law. Id. at 728-29. See also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 672-73 (1979).

The need for a uniform interpretation of R.S. 2477 is assessed by examining congressional intent in 1866. Sierra Club, 848 F.2d at 1082. The Tenth Circuit could find nothing here requiring uniformity. Id. The intent of the law, however, favors a liberal interpretation. R.S. 2477 was enacted during a period in which the national government actively encouraged exploitation, settlement, and development of the public domain. See, e.g., Cent. Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 473 (1932); Wilkenson, 634 F.Supp. at 1275; Homestead Act of 1862, 12 Stat. 392.

To promote these policies, development of the public domain was encouraged "with minimal federal supervision." Leroy K. Latta, Jr., "Public Access over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866," 28 Santa Clara L. Rev. 811, 819 (1988). Fulfillment of these objectives was more likely if local law rather than a uniform national law governed acceptance of the highway grant. Furthermore, a grant that serves a national purpose should receive "a more liberal construction in favor of the purposes for which it was enacted." United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893).

While it would be more convenient for federal agencies if just one standard governed acceptance of R.S. 2477, administrative convenience is insufficient to require a uniform rule. See O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 88 (1994). In fact, rejection of state law is reserved for "extraordinary cases." Id. at 89. See also Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 362 (9th Cir. 1998) (a

party bears a "heavy burden . . . in proving the need for uniformity or proving that state rules conflict with federal policy").

The second Kimbell Foods factor considers whether state law would frustrate federal policy. There must be "concrete evidence" that adopting state law will adversely affect a federal program. See Kimbell Foods, 440 U.S. at 730. The Tenth Circuit ruled that this factor favors state law because "[s]tate law has defined R.S. 2477 grants since the statute's inception." Sierra Club, 848 F.2d at 1082.

In other words, since state law has governed R.S. 2477 for well over 100 years without objection, it is unsound to argue today that it interferes with federal policy. State law and federal policy were compatible for over a century. It is true that since enactment of FLPMA in 1976 the policies of public land management have changed, but acceptance of the grant was perfected long ago. Acceptance under state law vested the public with rights-of-way on public land. This proposition has been acknowledged by the Department of Interior. "'When an acceptance . . . has once been made, the highway is legally established, and is thereafter a public easement upon the land . . . .'" Homer D. Meeds, 83 Interior Dec. 315, 321 (1976) (quoting Montgomery v. Somers, 90 P. 674, 677 (Or. 1907)).

The third Kimbell Foods factor -- the impact of a federal law on state interests -- "strongly supports the use of state law, as imposing a federal definition of R.S. 2477 rights-of-way would undermine the local management of roads across the western United States." Sierra Club, 848 F.2d at 1082. This is unquestionably true for North Dakota.

In addition, road questions are "'peculiarly local'" and involve matters where states have been "given great deference." San Antonio Metro. Transit Auth. v. Donovan, 557 F.Supp. 445, 447 (W.D. Tex. 1983) (citation omitted), rev'd on other grounds sub nom., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). See also Enrique Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 845-46 (1st Cir. 1982). Overseeing highways has traditionally been a state function "and thus appears to be within the activities protected by the tenth amendment." Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1083 (5th Cir. 1979).

In sum, the Kimbell Foods factors strongly favor adopting state law.[6]

R.S. 2477 only applies to unreserved public lands

[6] In 1988 this office concluded that Kimbell Foods required the U.S. Fish & Wildlife Service to comply with state law should it seek to close public roads crossing its wetland easements. 1988 N.D. Op. Att'y Gen. 152, 160.

R.S. 2477's grant applies only to federal land "not reserved for public uses." 14 Stat. 251, 253. Consequently, land that has always been in the public domain and has not been reserved for a particular use remained subject to state road laws until R.S. 2477 was repealed in 1976.

There is some uncertainty what constitutes "unreserved" federal land. Dep't of Interior Rpt., supra n.1 at 12 and at App. II, Exh. J at 5. For example, a court has stated that the Taylor Grazing Act of 1934 may have withdrawn land from the public domain, Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982), but a Department of Interior opinion states that the Act didn't have this effect, 86 Interior Dec. 553, 592 (1979).

Nonetheless, whether and when any federal land in North Dakota became reserved is beyond the scope of this opinion. Even if land was reserved, public roads established prior to any reservation have vested and a later dedication of the land to a particular purpose does not extinguish the right-of-way. Bird Bear v. McLean County, 513 F.2d 190, 192 (8th Cir. 1975).

Summary

The public acquired, under R.S. 2477, the right to use section lines and prescriptive roads on federal land in North Dakota. This right has existed for over 100 years. It is a "vested" and "absolute right." Walcott Tp. v. Skauge, 71 N.W. 544, 546 (N.D. 1897). This right, until recently, has never been questioned by the federal government. In fact, the federal government on many occasions and in many different ways acknowledged that state law defines how the grant is accepted. If the rights acquired under R.S. 2477 were to be revoked now, it would make the 1866 Act "a delusion and a cruel and empty vision." United States v. 9,947.71 Acres of Land, 220 F.Supp. 328, 331 (D. Nev. 1963).

Precedent also dictates that state law governs whether the public acquired rights under R.S. 2477. All state court decisions look to state law. Federal court decisions have adopted state law. The law under which the federal government manages the National Grasslands requires that it honor public rights-of-way. Finally, the federal court for the District of North Dakota ordered the federal government, when it acquired at least some of this land, to honor the public road system. Accordingly, it is my opinion that federal land in North Dakota can be, and, in fact, has been, burdened by public roads established by prescription under North Dakota law and by the state's section line law.

- 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 question presented is decided by the courts.

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