

LETTER OPINION
2000-L-151

September 13, 2000

Mr. John Mahoney
Oliver County State's Attorney
PO Box 355
Center, ND 58530

Dear Mr. Mahoney:

Thank you for your September 6, 2000, letter asking whether the "factfinder" discussed in my September 1, 2000, opinion to you refers to the Oliver County Commission.

In my September 1, 2000, opinion, I stated:

A board of county commissioners, after notice and public hearing, may temporarily close or relocate the section line road if 1) the road is not required due to readily accessible alternate routes of travel and 2) the closing or relocation does not deprive adjacent landowners access to their property. BNI has apparently attempted to provide an alternative route of travel so that the closure of the section line road does not deprive adjacent landowners access to their property, by building a road through the east half of section 21 which is owned by Rose Bobb. The issue of whether BNI had the authority to build this road for public travel across section 21 is relevant in determining whether there are readily accessible alternate routes of travel and whether the closure of the section line road deprives adjacent landowners access to their property.

2000 N.D. Op. Att'y Gen. L-144, L-145 to 146 (Sept. 1 to John Mahoney). I stated that N.D.C.C. § 38-14.1-07 may also apply. "This law would allow a road relocation only if, after notice and hearing, the county commission makes a written finding that the interests of the public and the affected landowners will be protected." 2000 N.D. Op. Att'y Gen. L-144, L-146 (Sept. 1 to John Mahoney). The opinion also stated: "The North Dakota Supreme Court has stated that reasonable use of the surface is a question of fact that requires consideration of the circumstances of both parties and one to be resolved by the trier of fact." 2000 North Dakota Opinion of the Attorney General L-144, L-147 (Sept. 1 to John Mahoney).

In order to determine whether the lease authorizes BNI to build this road for public travel across section 21, it is appropriate for the Oliver County Commission to act as a factfinder, who should consider

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all of those factors referred to in the September 1, 2000, opinion. In doing this, the Oliver County Commission should rely upon the county state's attorney's assistance in interpreting relevant court case law. If the county states attorney has a conflict of interest, an assistant states attorney may be appointed to assist the county commission or a judge may appoint an attorney to provide such assistance. See N.D.C.C. §§ 11-16-02, 11-16-06.

A decision of a board of county commissioners may be appealed to district court. See N.D.C.C. § 11-11-39 and N.D.C.C. ch, 28-34.

Sincerely,

Heidi Heitkamp
Attorney General

las/lk