LETTER OPINION
2008-L-18

December 16, 2008

The Honorable Rodney J. Froelich
State Representative
8710 Highway 6
Selfridge, ND 58568-9556

Dear Representative Froelich:

Thank you for your letter asking about the constitutionality of N.D.C.C. § 47-05-17. The statute provides that a landowner may not sever or separately sell hunting access rights from the surface estate.[1] You question[2] whether this restriction is an unconstitutional taking of private property without just compensation. Based upon the following, it is my opinion that section 47-05-17, is not a *per se* violation of the takings clause of either the state or federal constitutions.[3]

ANALYSIS

Normally, this office is reluctant to rule on the constitutionality of a statutory enactment unless there is substantial controlling case law.[4] This office has also been reluctant to

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[1] N.D.C.C. § 47-05-17:

> The right of access to land to shoot, shoot at, pursue, take, attempt to take, or kill any game animals or game birds; search for or attempt to locate or flush any game animals and game birds; lure, call, or attempt to attract game animals or game birds; hide for the purpose of taking or attempting to take game animals or game birds; and walk, crawl, or advance toward wildlife while possessing implements or equipment useful in the taking of game animals or game birds may not be severed from the surface estate. This section does not apply to deeds, instruments, or interests in property recorded before August 1, 2007.

[2] A constitutional challenge or question that is not based upon a set of facts is typically referred to as a "facial challenge."

[3] Although there are additional standards and tests adopted by the state and U.S. Supreme Courts that could be used to address your question, it would be inappropriate for me to apply such tests in the absence of any factual context.

[4] N.D.A.G. 2007-L-05.

issue an opinion questioning the constitutionality of a statutory enactment because it is the Attorney General's role to defend statutory enactments from constitutional attacks.[5] Given these qualifications, I will address your question by addressing some of the controlling and more objective tests adopted by the courts.

There are a handful of principles that guide any discussion of a statute's constitutionality. Once enacted, a statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution.[6] Federal courts also apply this presumption when considering a state statute's constitutionality.[7] Therefore, those bringing a challenge must clearly prove a statute's unconstitutionality.[8] The significance of this principle is embodied in the North Dakota Constitution, which provides that the state's Supreme Court "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."[9] Further, it should be noted that takings claims that raise facial challenges[10] rarely succeed. The United States Supreme Court has repeatedly explained that a facial challenge to a law is the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the law would be valid.[11]

The takings clause in the federal constitution – which is applicable to the states[12] – provides that "private property [shall not] be taken for public use, without just compensation."[13] The North Dakota Constitution similarly provides: "[p]rivate property

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[5] Id.
[6] N.D.C.C. § 1-02-38; Grand Forks Prof'l Baseball, Inc. v. N.D. Workers Comp. Bureau, 654 N.W.2d 426, 431 (N.D. 2002); Traynor v. Leclerc, 561 N.W.2d 644, 647 (N.D. 1997).
[7] 1st English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 327 (1987); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981).
[8] MCI Telecomms. Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994); Oakland Club v. S.C. Pub. Serv. Auth., 110 F.2d 84, 88 (4th Cir. 1940).
[9] N.D. Const. art. VI, § 4.
[10] See Footnote 2.
[11] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 617-18 (1988); Reno v. Flores, 507 U.S. 292, 301 (1993); Rust v. Sullivan, 500 U.S. 173, 183 (1991); Ohio v. Akron Ctr. For Reprod. Health, 497 U.S. 502, 514 (1990).
[12] E.g., Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W. 2d 850, 856 (N.D. 2005).
[13] U.S. Const. amend V.

shall not be taken or damaged for public use without just compensation. . . ."[14] The North Dakota Supreme Court's interpretation of the state takings clause differs little from the federal judiciary's interpretation of the federal takings clause.[15]

There are essentially two different ways that government can "take" property. The classic "taking requiring just compensation is a direct government appropriation or physical invasion of private property."[16] Government can also take private property through a regulation, referred to as a regulatory taking, determined to be so onerous that it amounts to a direct appropriation. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[17] "The rub, of course, has been – and remains – how to discern how far is 'too far.'"[18]

There are two categories of regulatory action that are inherently, or per se, takings. The first is where government, through a regulation, imposes on a landowner a permanent physical invasion of the property, however minor it may be.[19] This category requires compensation because a permanent physical invasion caused by a regulation impinges on what is perhaps the most fundamental property interest, a landowner's "right to exclude." Section 47-05-17, N.D.C.C., does not require a property owner to suffer any kind of physical invasion; thus the statute is not a taking under the first per se rule.

The second category of per se takings involves regulations that deny a landowner all economically beneficial or productive use of the land.[20] Prohibiting a landowner from severing hunting access from the surface estate – at least when considering customary uses and characteristics of North Dakota land – would not reasonably be said to deprive landowners of either all economic or all productive use of their land. Indeed, the bulk of a typical landowner's customary uses remain unaffected.

Even though N.D.C.C. § 47-05-17 would likely survive each per se taking category, a taking can occur outside of these two categories. However, the law beyond the two per

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[14] N.D. Const. art. I, § 16.
[15] See Wild Rice River Estates, 705 N.W.2d at 856-57; McCrothers Corp. v. City of Mandan, 728 N.W.2d 124, 141 (N.D. 2007).
[16] Lingle v. Chevron USA, Inc., 544 U.S. 528, 537 (2005).
[17] Id. (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
[18] Lingle, 544 U.S. at 538.
[19] Lingle, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking).
[20] Lingle, 544 U.S. at 538 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)); see also Wild Rice River Estates, 705 N.W.2d at 854.

se categories does not provide, as noted by the U.S. Supreme Court, an easily applied "'set formula.'"[21] The North Dakota Supreme Court concurs, recognizing that in this respect its decisions lack "[c]lear guidelines."[22] Both courts, in determining whether a taking has occurred outside of the two per se categories, consider three factors: the law's "'economic impact'" on the landowner, the extent to which the law interferes with the landowner's "'distinct investment-backed expectations,'" and "'the character of the governmental action.'"[23] These are known as the "Penn Central" factors.[24] Since determination of the significance of these factors in a takings challenge can only be accomplished through a case-by-case factual analysis, it is not feasible to further analyze your question under the Penn Central holding.

Therefore, it is my opinion that N.D.C.C. § 47-05-17 would survive a court challenge under the per se tests for constitutionality. Whether the statute would survive a challenge under the Penn Central tests can only be determined based on specific facts presented to a court. Even so, the statute would be presumed constitutional regardless of the tests applied, as discussed earlier in this opinion.

Sincerely,

Wayne Stenehjem
Attorney General

cmc/pg

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.[25]

[21] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
[22] Minch v. City of Fargo, 332 N.W.2d 71, 73 (N.D. 1983).
[23] Wild Rice River Estates, 705 N.W.2d at 857 (quoting Penn Cent., 438 U.S. at 124).
[24] See Penn Cent., 438 U.S. at 124.
[25] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).