

N.D.A.G. Letter to Renner (Aug. 6, 1986)

August 6, 1986

Mr. Jerome L. Renner
Kidder County State's Attorney
P. O. Box 229
Steele, North Dakota 58482

Dear Mr. Renner:

Thank you for your inquiry of May 7, 1986, relative to the repair and maintenance of former U.S. Highway 10 as it crosses Kidder County and the potential liability arising from the non-maintenance of the same highway. I regret the delay in responding to your inquiry; however, the Highway Department was experiencing a delay in locating the documents pertinent to your question. I have enclosed copies of these documents for your use.

Two statutory provisions have application to your inquiry. N.D.C.C. § 24-01-06 provides that the Highway Commissioner can abandon sections of highways on the state highway system when they are replaced by a new highway, even though the abandoned section is not placed on any other highway system. N.D.C.C. §24-01-01.1(1) defines the word "abandonment" as meaning the cessation of the use of the highway right-of-way without any intention to reclaim or use the right-of-way for highway purposes.

The Highway Commissioner's Order No. 56, dated December 27, 1966, constitutes the purported Abandonment Order. The tenor of the Abandonment Order is inconsistent with the statutory definition of abandonment. The order evinces a clear intent not to relinquish the use of the right-of-way for highway purposes. This lack of intent to abandon is made apparent by Arthur E. Feldner's letter of December 28, 1966, wherein it is reiterated that the Highway Department will not continue its jurisdiction or maintenance responsibilities with respect to that portion of U.S. Highway 10 described in Order No. 56, and will transfer the right-of-way to Kidder County.

Consistent with Mr. Feldner's letter of December 28, 1966, the Highway Department drafted a quitclaim deed for the right-of-way in question and conveyed it and a right-of-way plat to the Kidder County auditor on February 15, 1967.

These documents were accompanied by the letter of Robert King to Mr. Lester E. White, dated February 15, 1967. Whether the quitclaim deed was ever recorded by Kidder county is unknown. (The Highway Department does not have a record of the number of the plat book number in which the original project number was recorded.)

Seemingly, some type of agreement or accord was reached between the Highway Department and Kidder County with respect to the transfer of this highway right-of-way.

James O. Kyser's letter of September 28, 1967, indicates that the Highway Department had fulfilled its obligation regarding the patching, sealing, and striping on the section of U.S. Highway 10 in question, and that the future responsibilities for such work would be that of Kidder County.

All of these documents reinforce the conclusion that the so-called Abandonment Order of December 27, 1966, did not intend to accomplish the cessation of the use of the U.S. Highway 10 right-of-way for highway purposes. The Colorado Supreme Court in Hand v. Rhodes, 245 P.2d 292 (1952), in addressing a similar question relative to abandonment, concluded that when a highway is abandoned, it ceases to be a highway and the public servitude for that purpose is removed. Upon such removal, the real property reverts to the status of private ownership and cannot be reestablished, except in the manner required to create a new highway.

Another fact that contradicts the abandonment concept is the fact that by resolution dated January 7, 1976, the Kidder County Board of Commissioners placed the segment of highway in question on the Kidder County Federal-Aid Secondary Highway System. A plat annexed to the resolution also outlined the same section of highway as being on the County Federal-Aid Secondary Highway System. As such, the county highway became eligible for federal funds for its reconstruction, etc.

From the documents at hand, one can only conclude that the Highway Department did not statutorily effectuate an abandonment of the highway in question. Lacking a clear intent to abandon the highway right-of-way, it remained in the public domain and there would be no reversion of the right-of-way to the abutting property owners.

The failure of the abandonment process, coupled with the Kidder County Board of Commissioners' Resolution of January 7, 1976, placing the section of highway on the County Federal-Aid Secondary Highway System, leads me to the opinion that Kidder County has jurisdiction over the highway in question. Hence, the maintenance responsibility and any ensuing liability stemming from any neglect of that duty would rest with Kidder County.

Sincerely,

Nicholas J. Spaeth

pg
Enclosures