N.D.A.G. Letter to Johnson (Dec. 31, 1984)

December 31, 1984

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Dear Dennis:

Thank you for your letter of October 4, 1984, regarding the problems you are experiencing with the U.S. Forest Service concerning the use of section lines for road access on Forest Service Property.

This subject presents rather complex problems and issues. Among the factors which require review are acts of Congress, federal statutes, federal case law, acts of the Dakota Territorial Legislature, acts of the North Dakota Legislature, North Dakota case law, presidential executive orders, as well as orders from the secretaries of various United States governmental departments. Due to these factors, the response issued from this office will take the form of an information memorandum which will contain our legal conclusion.

I. A HISTORICAL ANALYSIS OF THE HIGHWAY ACT OF JULY 26, 1866 AND NORTH DAKOTA CASE LAW.

The Highway Act of July 26, 1866, Ch. 262, § 8, 14, stat. 253, R.S. Section 2477, now codified as 43 U.S.C. § 932, provided that:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is granted.

This was interpreted as an offer of public land which could be accepted by the states in various ways. The Dakota Territory acceptance of this grant was effectuated by Laws, Dakota Territory, 1871, Chapter 33, which provided as follows:

> Hereafter, all section lines in this territory shall be and are hereby declared public highways as far as practicable.

This law quoted immediately above remained essentially the same until it was amended in 1897 by the State Legislature. It has subsequently been amended several times and is now codified at Section 24-07-03 of the North Dakota Century Code, which states as follows:

> 24-07-03. SECTION LINES CONSIDERED PUBLIC ROADS--CLOSING SAME UNDER CERTAIN CONDITIONS. In all townships in this state, outside the limits of incorporated cities, and outside platted townsites, additions, or subdivisions recorded pursuant to chapter 40-50, the congressional section lines shall be considered public roads, to be opened to the width of two rods [10.06 meters] on each side of such section lines, . . .

The North Dakota Supreme Court has on many occasions interpreted the scope of Section 2477, Revised Statutes, United States. This section, from its clear wording, conveys a present grant. When, therefore, the provision was acted upon and accepted by the Territorial Legislature, such acceptance related back to, and became effective from the date of the grant. Walcott Township of Richland County v. Skauge, 71 N.W. 544, 546 (N.D. 1897).

It is also clear that the right granted to the state was not in the nature of a license revokable at the pleasure of the grantor, but that highways once established over the public domain under and by virtue of the act became vested in the public who had an absolute right to the use thereof which could not be revoked by the government. In addition, whoever thereafter took the title from the government took it burdened with the highway so established. Faxon v. Lallie Civil Township, 163 N.W. 531, 533 (N.D. 1917).

Inasmuch as it is undisputed that it is entirely practicable to use the section line for highway purposes, a public highway was unquestionably located and established on such section line by virtue of the legislative acceptance of the federal grant. The highway so established has never been vacated and still exists. Huffman v. West Bay Township, 182 N.W. 559, 561 (N.D. 1921). However, it should be noted that decisions of other state courts are in conflict regarding the acceptance of the federal grant under Section 2477. This issue of acceptance will be discussed later in the memorandum.

The principles and explanations regarding Section 2477 have also been embraced by recent court decisions. See Small v. Burleigh County, 225 N.W.2d 295 (N.D. 1974), DeLair v. County of LaMoure, 326 N.W.2d 55 (N.D. 1982).

II. SECTION 2477 AND SUBSEQUENT FEDERAL GOVERNMENTAL ACTION.

In 1976, 43 U.S.C. § 932 was repealed under the "Federal Land Policy and Management Act of 1976." That act, known as Public Law 94-579, Title VII, Section 706(a), October 21, 1976, 90 Stat. 2793, states as follows:

> Section 706. . . .
>
> (a) Effective on and after the date of approval of this act, R.S. 2477 (43 U.S.C. 932) is repealed in its entirety and the following statutes or parts of statutes are repealed insofar as they apply to the issuance of rights-of-way

over, upon, under, and through the public lands [and lands] in the national forest system. . . .

It should be noted, however, that there was a saving clause contained in the act which preserved existing rights-of-way. Under Public Law 94-579, Title VII, Section 701(a), it was stated:

Section 701. .

(a) Nothing in this act, or in any amendment made by this act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this act. (Emphasis supplied).

The effect of the repealing of 43 U.S.C. 932 is unclear due to the fact that state court decisions and state statutes are in conflict with each other on the issue of how a right-of-way under R.S. 2477 is perfected or accepted. On the one hand, if the rights-of-way were perfected before the statute was repealed, the status of these rights-of-way would be unaffected due to the saving clause. However, if the rights-of-way were not perfected prior to 1976, any subsequent perfection would be ineffective.

Generally, the approach of the states in perfecting rights-of-way appears to fall into three general categories. First, some states (Kansas, North Dakota, South Dakota, and Alaska) have held that state statutes which purport to establish such rights-of-way along all section lines are sufficient to perfect the grant upon enactment of the state statute even if no highway had either been constructed or created by use. Tholl v. Koles, 70 P. 881 (Kan. 1902); Faxon, supra; Pederson v. Canton Township, 34 N.W.2d 172 (S.D. 1948); Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alas. 1975). Second, states such as Colorado, Oregon, Wyoming, New Mexico, and Utah, have held that R.S. 2477 rights-of-ways can be perfected solely by public use, without any construction or maintenance. Nicholas v. Grassle, 267 P. 196 (Colo. 1928); Montgomery v. Somers, 90 P. 674 (Ore. 1907); Hatch Brothers Company v. Black, 165 P. 518 (Wyo. 1917); Wilson v. Williams, 87 P.2d 683 (N.M. 1939); Lindsey Land and Livestock Company v. Churnos, 285 P. 646 (Utah 1930). Third, Arizona courts have held that such rights-of-way can be established only by a formal resolution of local government, after the highway has been constructed. Perfection by mere use is therefore not recognized in Arizona. Tucson Consolidated Copper Company v. Reese, 100 P. 777 (Ariz. 1900).

In a memo which was received by this office from the United States Department of Agriculture Forest Service, it is the position of the federal government that the Arizona courts are the only courts which have correctly interpreted R.S. 2477. The memo continues to state as follows:

The term "construction" must be construed as an essential element of the grant offered by Congress; otherwise, Congress' use of the term is meaningless and superfluous. The states could accept only that which was offered by Congress and not more. Thus, rights-of-way which states purported to accept but on which highways were not actually

constructed prior to October 21, 1976, do not meet the requirements of R.S. 2477 and therefore no perfected right-of-way grant exists.

The position of the federal government is strengthened through a recent ruling by the 9th Circuit Court of Appeals. In United States v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411 (9th Cir. 1984), the court held that the federal statute (43 U.S.C. 932) granting right-of-ways for construction of highways over public lands not reserved for public uses does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated. The Court rules, therefore, the scope of a grant of federal land is a question of federal law. Id. at 1413. Earlier the Ninth Circuit ruled that any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government. Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982). However, in some instances, it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. Gates, 732 F.2d at 1413, citing United States v. Oregon, 295 U.S. 1 (1935).

In the case of North Dakota, it can reasonably be argued that the United States has impliedly adopted and assented to North Dakota's rule of construction as applicable to the federal conveyance. In Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975), the 8th Circuit Court of Appeals embraced the reasoning of the North Dakota Supreme Court in the case of Faxon v. Lallie Civil Township, 163 N.W. 531 (N.D. 1917). In Faxon, the court stated that the grant made by Congress in 1866 and accepted by the Dakota Territory in 1871, constituted an acceptance of the congressional grant. Id. at 532. Also, when the provision was acted upon and accepted by the Dakota Territory, such acceptance related back and became effective from the date of the grant. Id.

In Bird Bear, supra, the 8th Circuit Court of Appeals was faced with a situation in which Indian trust patentees who were joint tenants of land allotment brought an action on the basis of trespass against the county and township which maintained section line roads over their property. The court of appeals held that the Highway Act of 1866 granting an easement for section line roads over the Indian's property was operative notwithstanding the fact that the Indians held the land pursuant to a trust patent issued by the United States subsequent to the enactment of the Highway Act. In their opinion, the court after favorably citing Faxon stated:

> We are convinced that the grant of right-of-way initially attached to the land in question in 1866 and has been operative since that time. 513 F.2d at 142, 143.

It could be argued that, due to the ruling in Bird Bear, the United States, as far as North Dakota is concerned, has impliedly adopted and assented to the state rule of construction that the grant made by Congress in 1866 was accepted by the Territorial Legislature in 1871.

The significance of this argument can be stated quite simply: 1) North Dakota accepted the congressional grant for rights-of-way in 1871 which related back to 1866; 2) the rights-of-way are still in existence; and therefore; 3) the repealing of 43 U.S.C. 932 has no effect in North Dakota.

III. THE PUBLIC LANDS ISSUE UNDER 43 U.S.C. 932.

Another critical issue which needs to be discussed is whether the land in question was considered public land not reserved for public uses at the time the Dakota Territorial Legislature accepted the federal right-of-way grant in 1871.

43 U.S.C. 932 (repealed, 1976) stated as follows:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

The crucial language of Section 932 in this case is the phrase "public lands." Such lands are those subject to sale or other disposal under general laws excluding those to which any claims or rights of others have attached. Humboldt County v. United States, 694 F.2d 1276, 1281 (9th Cir. 1982). Thus, unless the land in question was "public land" at the time of the acceptance of the grant in 1871, this state could not have acquired any right to it under Section 932.

There can be no doubt that the land which was included in the Dakota Territory in 1866 was considered part of the public domain and therefore public land. See Faxon, supra. It is also clear that the 1866 federal grant of rights-of-way over this land was accepted by the Dakota Territory in 1871. The courts have consistently ruled that the acceptance in 1871 related back to the original grant in 1866. Walcott Township of Richland County v. Skauge, 71 N.W. 544 (N.D. 1897).

Therefore, the critical date in the case of North Dakota is 1866. That is the date on which the land in question needed to be considered public land to fall under Section 932. There can be no question that in 1866 the land in the Dakota Territory was public land. It should be noted that the congressional grant of rights-of-way on section lines was codified in the North Dakota Century Code under Section 24-07-03, N.D.C.C.

It appears that the Forest Service will take the position that the section line law does not apply to them regardless of the fact that the state accepted the right-of-way grant in 1871 which related back to 1866.

It also appears that the federal government maintains the position that the land in question is not subject to the section line law and that such law does not apply to the federal government regardless of the fact that the original land grant was accepted by the State of North Dakota.

In 1937, the United States Congress passed the BankheadJones Farm Tenant Act of July 22, 1937 50 stat. 522, 525, 7 U.S.C.A. Section 1011, et seq. Pursuant to the provisions of this act and two executive orders, No. 7672 and No. 7673, issued on July 19, 1937, the federal government withdrew public lands in North Dakota for the use of the Department of Agriculture. The purpose behind this action was apparently to establish better land use management. This land was administered through the Soil Conversation Service of the Department of Agriculture. Subsequently in 1954, much of this land came under the jurisdiction of the United States Forest Service and in 1960 was officially named as a National Grassland. However, regardless of this governmental action, it is interesting to note that this action removing this land from the public domain did not take place until 71 years after the acceptance of the original grant by the Territory of Dakota.

The federal government may argue that the significance of these dates are unimportant and the only matter to be considered is the fact that the federal government now has jurisdiction over the land in question. However, the state's argument is that the dates are very significant, a position that is supported by two 8th Circuit Court of Appeals decisions. In United States v. Bennett County, 394 F.2d 8 (8th Cir. 1968), the Court found that the land across which the county sought to build a section line road pursuant to the right-of-way across public lands granted by the Highway Act of 1866, was not subject to the act even though the Indian title to the land had been continually recognized since the Treaty of Fort Laramie of 1851. The conclusion the court reached was that the Treaty of 1851 was recognition of Indian title. Therefore, this land could no longer be considered public land for purposes of the Highway Act of 1866, 43 U.S.C. 932.

However, in the case of Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975) the court found that the plaintiff's allotment of land was not made part of the Fort Berthold reservation until 1880. Id. at 192. In 1866, the land currently held in trust for the plaintiffs was public land. Id. Thus, the court found that the grant to the state under the Highway Act had vested prior to the inclusion of what is now the Bird Bear allotment in the Fort Berthold reservation. The court further found that there is no evidence to suggest that the rights in this land, which was clearly subject to the highway acts grant have been divested by subsequent congressional action. Id. It appears that the 8th Circuit Court of Appeals considers the dates of these various land grants rather important.

In the present case, following the reasoning of Bennett and Bird Bear, since the land in the Dakota Territory was public land in 1866, and was accepted by the Territorial Legislature in 1871, the date of 1866 is very important. It is also clear that it was not until 71 years later that the land in question was taken off of the public domain.

It is my opinion, that notwithstanding the fact the land in question was removed from the public domain in 1937, the rights-of-way attached in 1866 and have not been extinguished.

In conclusion, it appears that the land in question was public land in 1866. The Highway Act of 1866 granted rights-of-way over all public land not reserved for public use. Therefore, all of the land in North Dakota which was public land received a grant of

right-of-way from the federal government. It is my opinion that subsequent governmental action by federal authorities does not diminish nor extinguish the original grant.

Therefore, it is my further opinion that the State of North Dakota still possesses a right-of-way easement over the land in question which is regulated by the Forest Service.

Sincerely,

Robert O. Wefald

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cc: Governor Allen I. Olson
Honorable Rodney S. Webb, United States Attorney