

OPINION
63-156

April 19, 1963 (OPINION)

HIGHWAYS

RE: Section Line - Travel by Public

Your letter of March 27, 1963, has been received. You wish an opinion from this office on the following set of facts:

'A' owns a small tract of land in the northwest corner of a quarter section. The western boundary line of this tract runs along the north-south section line a distance of approximately 38 rods. 'A' has a township road on the northern frontage of this tract giving access thereto from both east and west. 'A' owns pasture land in the quarter section directly south of the quarter section in which the small tract is located. 'B' owns the remaining acreage of the quarter section in which 'A's' small tract lays and also the quarter section adjacent thereto on the west. 'A' wishes to run cattle between the small tract and the pasture land as her water source is on the small tract. 'B' will not allow her to run cattle on this property or build a fence so the cattle would have a passageway.

'A' has asked the Township Board to open the section line from the southern boundary of her small tract to the northern boundary of the pasture land, and has indicated a desire to build a fence 2 rods on either side of the section line. I am attaching a diagram to this letter."

It appears that the ultimate question we must decide is whether or not any proceedings are necessary by the township board before a section line may be used for travel. The Congress of the United States granted rights-of-way for highways over public lands in 1866. In 1871, the Dakota Territorial Legislature accepted the federal grant by Chapter 33 of the Session Laws. By acceptance of this federal grant, the Territorial Legislature established a system of highways upon all section lines in the state as far as it is practicable to use them for highway purposes. (See Hoffman v. Board of Supervisors, 182 N.W.459, 461.)

Section 24-07-03 of the North Dakota Century Code provides as follows:

SECTION LINES CONSIDERED PUBLIC ROADS. In all townships in this state outside the limits of incorporated cities and villages, the congressional section lines shall be considered public roads, to be opened to the width of two rods on each side of such section lines, where the same have not been opened already upon the order of the board having jurisdiction, without any survey being had, except where it may be necessary on account of variations caused by natural obstacles, subject, however, to all the provisions of this chapter in relation to

assessments of damages."

You will note that none of the cases annotated under this section specifically hold that no proceedings are necessary before a section line may be used as a public road. However, the case of Lawrence v. Ewert, 114 N.W.709, a South Dakota case in 1908 held that a public highway is a passage or road which every citizen has a right to use and the section lines throughout the territory, as far as practicable, should be open to the use of the public and no action of the board of supervisors of townships is required to establish or open such highways. The South Dakota Supreme Court went on to say that the highways so established by the legislative authorities cannot lawfully be obstructed by private citizens until changed or vacated in the manner provided by law.

Section 24-06-28 of the North Dakota Century Code provides as follows:

OBSTRUCTION OF SECTION LINES PROHIBITED - EXCEPTION. No person shall place or cause to be placed any permanent obstruction or stones or rubbish within thirty-three feet of any section line, unless he first shall secure permission in writing from the board of county commissioners or the board of township supervisors, as the case may be. Such permission shall be granted only where the topography of the land along such section line is such that in the opinion of the board of county commissioners or board of township supervisors, as the case may be, the construction of a road on the section line is impracticable. The provisions of this section shall not prohibit construction of fences along or across section lines not open for travel but such fences shall be subject to removal as provided in section 24-06-30."

Section 24-06-30 of the North Dakota Century Code provides as follows:

REMOVAL OF FENCES - NOTICE - COST. When a public highway is opened along any section line within the state, the board of county commissioners or the board of township supervisors, as the case may be, shall notify the owner of adjacent property to remove any fences within thirty-three feet of said section line, in the manner provided for notice to remove stones or rubbish, and if said owner shall fail to remove the same within thirty days after such notice has been given, the board of county commissioners or the board of township supervisors, as the case may be, shall cause such fences to be removed, and the cost thereof shall be returned and entered the same as taxes against the property and shall be paid in the same manner as taxes are paid."

You will note the last sentence of Section 24-06-28 allows a landowner to construct a fence along or across section lines which are not open for travel. It is the opinion of this office that the right of the landowner to fence a section line is inferior to the right of the public use of such section lines for public travel, and hence any landowner desiring to fence across a section line might do well to put a gate on such fence so that anyone desiring to travel

along such section line may do so.

In the previously mentioned case of Hoffman v. Board of Township Supervisors, Page 461 of that opinion, Chief Justice Robinson's concurring opinion provides in part as follows:

This case presents an appeal from an order opening a section line highway. By the statutes of the United States, and of this state, and by universal custom, the land for two rods on each side of a section line is a highway and the public has a right to use the same as a highway without any order opening it."* * *

It is the opinion of this office that all Congressional section lines in this state are open to travel by the public without the necessity of any action being taken by the board of county commissioners or township supervisors, as the case may be, and such members of the public as wish may use such section lines the same as they would any other public roadway. Thus, while the board of township supervisors need not formally open the section line or expend any funds in this regard, party "A" would have the right to use this section line as a public passageway. Of course, "A" would have no right to build a fence on "B's" property which runs to the section line, unless "B" would allow it. The public has only an easement for passage over this four rod strip along the section line and the fee title to this strip of land is in the adjoining landowner.

HELGI JOHANNESON

Attorney General