

**OPINION
74-330**

September 12, 1974 (OPINION)

Mr. Russel W. Stuart
Commissioner, North Dakota
Game and Fish Department
2121 Lovett Avenue
Bismarck, ND 58505

Dear Mr. Stuart:

This is in reply to your letter of August 27, 1974, relative to the posting of road and highway ditches. You state the following facts and questions:

"Throughout the hunting seasons, the Department is often asked questions concerning the statute governing the posting against trespass of private lands and the effect of such posting in regard to the hunting or trespassing of road and highway ditches.

If the question concerns an ordinary township road wherein the road right-of-way is confined to sixty-six feet on four roads, we refer to the court case, Rutten v. Woods.

However, the question may concern a state highway or a farm to market road wherein additional right-of-way has been acquired either through easement or fee title. I respectfully request your opinion concerning the legality of trespass, for the purpose of hunting, in roadside ditches wherein additional right-of-way has been acquired by the state or the county if the private land adjacent to the road has been posted by the private landowners."

Section 20.1-01-17 of the North Dakota Century Code, as amended, provides:

"POSTING OF LANDS BY OWNER OR TENANT TO PROHIBIT HUNTING - HOW POSTED - SIGNS DEFACED. Only the owner or tenant of any land may post it by placing signs alongside the public highway or the land giving notice that no hunting is permitted on the land. The name and address of the person posting the land and the posting date shall appear on each sign in legible characters. The signs shall be readable from the outside of the land, shall be placed conspicuously not more than four hundred forty yards apart. As to land entirely enclosed by a fence or other enclosure, posting of such signs at or on all gates through such fence or enclosure shall be construed to be a posting of all such enclosed land. No person shall in any manner deface, take down, or destroy posting signs."

Assuming that the provisions of the above quoted statute are followed, we believe the rationale in Rutten v. Wood, 57 N.W.2d. 112 (N.D. 1953) would apply equally to easements acquired for right-of-way on county and state highways. In the Rutten case, the

Court cited with approval the following statement from 25 Am. Jur. 426, Highways, Section 132:

"In the absence of a statute expressly providing for the acquisition of the fee, or of a deed from the owner expressly conveying the fee when a highway is established by dedication or prescription or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner."

The Court noted the statutes of this State do not cover the precise question as to whether the public may legally hunt wild game upon the highways of the state. The Court concluded that where the owner of lands contiguous to both sides of a section line opened as a highway posted "no hunting" signs on both sides thereof, the hunter was not entitled to hunt wild game on the highway as an incident to his right to travel thereon and was properly enjoined from hunting on such highway.

While the Rutten decision involved the section line right-of-way established by law (see section 24-07-03 of the N.D.C.C.) there is no distinction for this purpose between that right-of-way and the easement which may be acquired for a county or state road which is not on the section line. In either instance, barring some specific provision in the easement given by the landowner for the right-of-way, the easement is only for the purpose of travel and not for the purpose of hunting. This is in accordance with Chapter 212 of the 1953 Session Laws (codified as section 32-15-03.1 and 32-15-03.2 of the N.D.C.C.) which provided that in granting conveyances to property for highway purposes it was intended by all parties that only an easement was granted and that no transfer to the State of North Dakota or any of its political subdivision of property for highway purposes shall be deemed to include any interest greater than an easement.

Thus in those instances in which the State or the county has acquired only an easement for highway purposes, it is our opinion that if the land adjoining has been properly posted to prohibit hunting, persons may not legally trespass on such roadside ditches for the purpose of hunting. Where the State or county has acquired a valid fee title for right-of-way, however, the adjoining landowner would have no authority to regulate hunting on such right-of-way.

Sincerely,

Allen I. Olson

Attorney General