

**OPINION
76-142**

September 7, 1976 (OPINION)

Mr. John E. Jacobson
State's Attorney
Mercer County
Stanton, North Dakota 58571

Dear Mr. Jacobson:

This is in reply to your letter of August 24, 1976, relative to an opinion issued to the Ramsey County State's Attorney on June 2, 1976, concerning the closing of section line roads. You state the following facts and questions:

"In reviewing the opinion above mentioned, I find that Mercer County is also effected. (sic) We are presently involved in a zoning question where in the ANG Coal Gasification Company is requesting a zoning change over approximately two sections of land. Their plans call for the closing of a section line road for a length of one mile through the middle of the plant site area. ANG does plan to construct a road along the section line bordering the south half of the west side of the plant site area and the south boundary of the plant site area and to upgrade the section line road along the south half of the east border of the plant site area. This of course, would mean that anybody who usually used that road would now have to travel an extra two miles to circumvent that plant site area.

"Does your opinion of July 2, 1976, apply equally to the closing of a section line under these circumstances?"

In the June 2, 1976, opinion, we considered the question, among others, of whether a purchaser of property may obstruct a section line by building a cottage across the section line. In that instance the facts involved a section line upon which no improved road had been constructed. We pointed out that while the question of the obstruction of a section line had been the subject of considerable litigation in this state, no court decision, to date, had discussed in depth the legal characteristics of a section line which had not been used as a road for vehicular travel. Your set of facts does not clearly reveal whether the section line in question has been used for vehicular travel although some of the statements contained in the letter lead us to believe the section line is so used.

In the June 2, 1976, opinion we concluded that the cottage could not be built across the section line, that a township did not possess the authority to "close a section line" but rather possessed only the authority to allow stones, rubbish, etc., within the section line right-of-way after finding that it is impracticable to construct a road along such section line, and that an action by a township board in closing a road does not restrict the public right to use the section line. We note that while the governing body may vacate a road in accordance with the statutes providing for same, such vacation would not appear to extinguish the public access granted by

virtue of the territorial legislature's acceptance of the 1866 offer of the United States.

While, as noted by the Supreme Court in *Small v. Burleigh County*, 225 N.W.2d. 295 (ND 1975), this office has, in a long line of opinions, consistently held that section line highways are open to the public without any action having been previously taken by a township or county board, that is not precisely the same question as whether the township or county board may take affirmative action to close the road. Prior to 1965 this office, while holding as indicated by the Supreme Court in *Small*, supra, that it required no affirmative action on the part of the township and county boards to open the section line roads had also indicated that such roads could be closed pursuant to the statutory provisions for closing roads. That portion was not inconsistent since the two questions are different. However, in 1965, the Legislature amended Section 24-07-03 of the North Dakota Century Code providing that section lines shall be considered public roads, to be opened to the width of two rods on each side of section lines by adding the following paragraph:

"The county commissioners, if petitioned by the adjoining landowners, are authorized to close section line roads or portions thereof which are intersected by interstate highways causing such section line road to be a deadend, providing the closing of such deadend section line road does not deprive adjacent landowners access to his property." (See Chapter 201, 1965 Session Laws.)

That provision has been subsequently amended, which amendment is not of significance to this question.

Thus, in a July 6, 1972, letter to Mr. John Romanick, State's Attorney, McLean County, this office indicated that the enactment of this provision "seems to suggest that this is the only authority under which a section line may be closed and farmed or cultivated." We further stated:

"We would thus express some reservations as to the board's authority to vacate a section line except as authorized under Section 24-07-03 as amended.

"Because section lines are considered public roads even though no highway has been constructed on same, we are of the view that the county commissioners may not create or order the vacation of a section line except possibly on a temporary basis. We believe that where the validity of the original order is in doubt there should be no question as to the right to rescind such order. Even without the question of validity of the original order, the county can reopen the section line."

A copy of the letter is enclosed herewith.

While not expressed in the July 6, 1972, letter, it appears that the Legislature, having statutorily outlined the conditions under which the section lines may be closed, i.e., because such section line is intersected by an interstate highway causing the section line to be a dead end, it has excluded any other conditions under which the

section line may be permanently closed. Therefore, prior to the enactment of the 1965 legislation certain letters and opinions of this office seem to suggest the section line can be closed as are other roads. Following the 1965 enactment the opinions seem to indicate such road can be closed only in the manner provided by the statutes, i.e., once the Legislature has outlined the specific conditions under which a section line road can be closed, it cannot be closed for other reasons.

The language of the North Dakota Supreme Court in *Saetz v. Heiser*, 240 N.W.2d. 67 (N.D. 1976) might create additional questions, in that the Court stated, page 72 of the reported case:

"The legislative history which has been furnished to us in this case indicates that in drafting the amendment to section 24-06-28, the Legislature was fully aware of this court's holding in *Small v. Burleigh County*, 225 N.W.2d. 295, 298 (N.D. 1974), where we said that the Legislature's belated tolerance of fencing on section lines is not effective to deprive the public of rights dating back to 1871 and 1866, and that the State does not own section line right-of-way but merely holds it as a trustee for the public. For this later principle, we relied primarily upon *Wenberg v. Gibbs Township*, 31 N.D. 46, 153 N.W. 440 (1915).

"Considering the specific language used and in light of *Small*, we conclude that the Legislature did not intend to violate its trust by tolerating fencing in any form which would effectively deprive the public of its right to free passage over section lines. Counsel for appellees, indicating that he had a direct concern in the drafting of the amendment to section 24-06-08, informs us that the legislative purpose was to accomplish a balancing of the public rights to passage and the rights of the fee owner in the section line."

This language of the Court and its decision therein may be construed to mean that the Legislature is without authority to provide for the closing of the section lines. We do not necessarily arrive at such conclusion, particularly in view of the fact that previous opinions of this office holding the section lines were open to public travel without further action of the township or county boards, relied upon a case from South Dakota (*Lawrence v. Ewert*, 114 N.W. 709 (1908) in which that Court stated, pages 710, 711 of the reported case:

"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" (emphasis ours)

This case was also cited by North Dakota Court with approval in *Small*, supra. Thus we would not necessarily conclude that the Legislature is prohibited from specifying the terms and conditions under which a section line road may be closed, although the language of the North Dakota Court in *Saetz*, supra, may appear to lead to a different conclusion.

We readily admit the entire matter is not free from doubt. Our Court

has not directly considered the question of whether the section line, although admittedly open to travel without affirmative action of the county or township board, may be closed by such boards, whether the Legislature has limited the authority of such boards in this respect, or whether the Legislature may in any manner permit the permanent closing of the section line. We believe the final answer will only be found in a decision of the Court on the specific question or by legislative action. Until either the Court or the Legislature speaks further on this subject, we adhere to the June 2, 1976 opinion, which would appear to apply to the situation outlined in your letter.

Sincerely,

ALLEN I. OLSON

Attorney General