OPINION
76-146

June 2, 1976 (OPINION)

Mr. Neil Thompson

Ramsey County State's Attorney

Devils Lake, ND 58301

Dear Mr. Thompson:

This is in reply to your letter of April 30, 1976 in which you request an opinion from this office on the subject of section lines. You have asked four questions. These are as follows:

1. When a section line road or section line is closed by action of a township board, does the owner thereof get the right to sell the property on each side of the section line within the 33 feet reservation?

2. Can the purchaser thereof obstruct the section line by building a cottage across the section line?

3. Can the township close a section line for any reason other than determining that it would be impractical to construct a road?

4. Does the action of the township board in closing the road restrict the public right to use the said section line?"

With regard to your first question, it is well settled that the owner of adjoining land along a section line owns the fee title to the property included in the 33 foot easement up to the section line. He owns fee title, and the public has merely an easement of passage. Small v. Burleigh County, 225 N.W.2d. 295; Rutten v. Wood, 57 N.W.2d. 112; Lalim v. Williams County, 105 N.W.2d. 339.

The answers to your last three questions are all predicated on a determination of the exact nature of a section line. As you know, this question has been the subject of considerable litigation in this state. No court decision, however, to this date has discussed in depth the legal characteristics of a section line which has not been used as a road for vehicular traffic.

The original offer from the federal government to the states and territories was quite brief. It stated simply:

> That the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. Section 2477, Revised Statutes 1866, (also found at Chapter 262, Statutes at Large; 43 USC 932).

This offer did not specify or limit the methods to be followed in the establishment of such highways, and they, therefore, must be established in accordance with the law of the state accepting the

grant. Ball v. Stephens, 158 P. 2d. 207 (Cal. 1945).

The offer was deemed accepted by what was then the Territory of Dakota with the enactment of Chapter 33, Laws of Dakota Territory, 1870-1871, which is also found at Section 1 of Chapter 29 of the Revised Code, Dakota Territory 1877. That acceptance, insofar as is relevant to the question, was as follows:

> All section lines shall be, and are hereby declared, public highways, as far as practicable. . .

Because of the language used in the offer of the United States to the states and territories, a question was quickly raised as to whether this offer became a grant which took effect immediately upon acceptance by a state or territory, or whether the grant did not take effect until a highway was actually established by such state or territory. Some states took the position that the act was a law rather than a conveyance, and therefore the grant remained in abeyance until a highway was established under some public law of the state and, therefore, no present interest passed with the grant. Stofferan v. Okanogan County, 136 P. 484 (Supreme Court Washington 1913). Other states, however, including North Dakota and South Dakota have taken the position that the act was a conveyance of a present interest which became effective upon acceptance by the state or territory. In the case of Hillsboro National Bank v. Ackerman, 189 N.W. 657 (1922) the North Dakota Supreme Court observed that:

> It has been determined that such grant when accepted by this state became a grant in praesenti; that all section lines in the Territory of Dakota, so far as practicable, became by operation of law public highways; that the highways thus established on section lines have never since been vacated or the right of the public in them in any way surrendered.

This is also the position taken by the Supreme Court of South Dakota, Lawrence v. Ewert, 114 N.W. 709 and at least one federal court, Wilderness Society v. Morton, 479 F. 2d. 842, (D.C. Cir. 1973), in which that court stated, with reference to the 1866 offer of the United States:

> That section acts as a present grant which takes effect as soon as it is accepted by the state.

It is apparent, then, that in 1871 the territorial legislature accepted the offer of the federal government of 1866, and as a result, all section lines in what is now the state of North Dakota became public highways. At this point, one might raise the argument that the acceptance by the territorial legislature was qualified, in that it declared that all section lines were declared public highways "as far as practicable." In the South Dakota case of Lawrence v. Ewert, supra, that clause was considered and dealt with as follows:

Appellants attach much importance to the clause, 'as far as practicable'; but is it quite evident that the only purpose of that qualification was to relieve the counties from the expenditure of moneys in the opening of highways not practicable without such expenditure, and do not limit or qualify the general language of the

section, providing that 'all section lines shall be and are hereby public highways,' as applicable to section lines which could be used as such highways without any additional expenditure of money or labor thereon.

The Supreme Court of North Dakota in Small v. Burleigh County, supra, pointed out that the above language was included in the North Dakota decision of Koloen v. Pilot Mount Township, 157 N.W. 672, with apparent approval.

Therefore, while no court decision to date has held that all section lines in the state of North Dakota are public highways, regardless of whether they are traveled or not, that conclusion has been strongly implied, and we will recognize its guidance.

The focus of the questions then, at this point, concerns the scope of legislation subsequent to the 1871 acceptance that might be designed to restrict public access along section lines. In the case of Walcott Township v. Skauge, 71 N.W. 544, the North Dakota Supreme Court observed, with regard to the 1866 act:

> Highways once established over the public domain under and by virtue of this act, the public at once became vested with an absolute right with the use thereof, which could not be revoked by the general government, and whoever thereafter took the title from the general government took it burdened with the highway so established.

The court, in Wenberg v. Gibbs Township, 153 N.W. 440, observed that:

> We very much doubt the power of the legislature to waive a right-of-way granted by congress in 1866 and accepted in 1871, especially as the state did not own said right-of-way, but merely held as trustee for the public. . .

While the above two quotes were perhaps dicta in their respective cases, they nevertheless exhibit a line of legal reasoning which could become law should a case which squarely faced that question be presented to the North Dakota Supreme Court. We say this in part because of approving reference to the above two excerpts in the recent cases of Small v. Burleigh County, supra and Saetz v. Heiser, 240 N.W.2d. 67 (1976).

If we conclude that all section lines in this state are public highway easements, even though not opened as roads by being graded, surfaced, or otherwise improved, then it follows that Section 24-06-28, N.D.C.C. pertaining to the obstruction of section lines, must be in accord with this reasoning. This section insofar as is applicable to the present discussion, provides as follows:

> Obstruction of Section Lines Prohibited - Exception - Certain Fences Not Considered Obstruction - Penalty. - No person shall place or cause to be placed any permanent obstruction or stones or rubbish within 33 feet of any section line, unless he first shall secure written permission 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.

Construing the foregoing language compatibly with the above excerpts from North Dakota court decisions requires a conclusion that while an obstruction may be placed "within 33 feet of any section line" after it has been determined by the appropriate governing body that construction of a road on that part of the section line is impracticable, the obstruction must not be of such a nature as to impede public access along such section line.

Therefore, in answer to your second question, it is our opinion that it would be impermissible to obstruct a section line by building a cottage across same, if the result was to impede or prevent public access along that section line.

In answer to your third question, a township does not possess the authority to "close a section line", but rather, possesses only the authority to allow stones, rubbish, or obstructions as discussed in the foregoing paragraphs, within the section line right-of-way, after a finding that it is impracticable to construct a road along such section line. (For a discussion of the authority of a county or township to authorize erection of fence gates and cattle guards across section lines, see Saetz v. Heiser, supra.)

In answer to your fourth question, it is our opinion that an action by a township board in closing a road does not restrict the public right to use said section line, because the section line is a permanent easement which cannot be extinguished by the action of a county or township. While the prospective governing body may vacate a road in accordance with 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.

Sincerely,

ALLEN I. OLSON

Attorney General