

Overruled by N.D.A.G. 2000-F-12

Date Issued: July 13, 1981 (AGO 81-74)

Requested by: Orrin B. Lovell, Golden Valley States Attorney

- QUESTIONS PRESENTED -

I.

Whether a board of county commissioners has any power to grant or refuse to grant a common pipeline carrier the right to construct a pipeline along a highway right-of-way pursuant to section 49-19-09 of the North Dakota Century Code.

II.

Whether the consent of the fee owner of the abutting property is necessary in those instances in which easements for highway purposes have been granted.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a board of county commissioners has no power to grant or refuse to grant a common pipeline carrier the right to construct a pipeline along a highway right-of-way pursuant to section 49-19-09 of the North Dakota Century Code.

II.

It is my further opinion that it is not necessary to obtain the consent of the fee owner of abutting property in those instances in which easements for highway purposes have been granted.

- ANALYSIS -

I.

Section 49-19-09, N.D.C.C., reads as follows:

49-19-09. PERMISSION TO SECURE RIGHT OF WAY - CONDITION. The right to lay, maintain, and operate pipelines, together with telegraph and telephone lines incidental to and designed for use only in connection with the operation of such lines along, across, or under any public stream or highway in this state, is conferred upon all common pipeline carriers. Any person, firm, limited partnership, joint-stock association, or corporation may acquire

the right to construct pipelines and such incidental telephone and telegraph lines along, across, or over any public road or highway in this state by filing with the commission an acceptance of the provisions of this chapter, expressly agreeing in writing that in consideration of the rights so acquired, the applicant shall be and become a common pipeline carrier, subject to the duties and obligations conferred or imposed in this chapter. Such right to run along, across, or over any public road or highway, as herein provided for, can be exercised only upon condition that the traffic thereon shall not be interfered with, that such road or highway shall be restored promptly to its former condition of usefulness, and that the restoration thereof shall be subject also to the supervision of the board of county commissioners of the county in which said highway is situated. The right to lay and operate pipelines along a public highway is conditioned only upon acceptance by the carrier of the provisions and requirements of chapter 49-19, N.D.C.C.. The only power granted the board of county commissioners by that section is the power of supervision over the restoration of the highway after construction of the pipeline.

## II.

The issue of obtaining consent from fee owners to the laying of pipeline along a public highway, whether within the thirty-three foot right-of-way on either side of a section line or within an easement acquired by either voluntary means or eminent domain, has not been directly addressed by either statutory or case law in North Dakota. Although there are exceptions, the general rule in other jurisdictions is that a public easement in a highway includes the right to lay pipes beneath the surface for the benefit of the public and that such use does not constitute an additional servitude entitling the fee owner to additional compensation or requiring further consent from the fee owner. (See 39 Am. Jur.2d., Highways, Streets and Bridges, Section 263, and 26 Am. Jur.2d., Eminent Domain, section 225.) It is our opinion that the general rule stated above should be followed in North Dakota.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD  
Attorney General

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