Office of the Attorney General
State of North Dakota

Opinion No. 87-17

Date Issued: August 18, 1987

Requested by: Vern Fahy
Secretary and State Engineer
North Dakota State Water Commission

--QUESTIONS PRESENTED--

I.

Whether the term "public roadway" in findings made by the Technical Committee set up by North Dakota and Minnesota to implement their Red River Dike Agreement means whatever the two states agree that it means.

II.

Whether the State Engineer may reopen a quasi-judicial administrative hearing to apply a definition of "public roadway" that differs from the definition applied in the original proceeding.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the term "public roadway" in findings made by the Technical Committee set up by North Dakota and Minnesota to implement their Red River Dike Agreement means whatever the two states agree that it means. Lacking agreement, the term means a way open to all people for passage at their pleasure.

II.

It is my further opinion that the State Engineer may not reopen a quasi-judicial administrative hearing to apply a definition of "public roadway" that differs from the definition applied in the original proceeding.

--ANALYSES--

I.

In 1976, Minnesota and North Dakota agreed to jointly regulate dikes on the Red River. In 1985, a Technical Committee was established to implement the agreement by making findings on seven

issues. In Finding No. 6 the Committee allowed deviations from the maximum allowable dike elevation. One of these exceptions states: "Where 'Alignment F' coincides with existing public roadways, the roadways may remain at their existing elevation, but may not be raised."

The two states now dispute the meaning of "public roadway." This has led to the inquiry about the meaning of "public roadway" in Finding No. 6. Before defining the term it is necessary to discuss the nature of the North Dakota-Minnesota Red River Dike Agreement and the law to be used in its interpretation.

The agreement concerns the regulation of the flows of an interstate river. Therefore, it is an agreement within Art. I, § 10, cl. 3 of the United States Constitution, the compact clause. State ex rel. Spaeth v. City of Oslo, Civ. No. A2-82-88 (D.N.D. Mar. 18, 1983) memorandum and order at 9-10. Such an agreement requires congressional consent (U.S. Const. Art. I, § 10, cl. 3) which has been given. See 33 U.S.C.S. § 11 (Law Co-op. 1980); 33 U.S.C.S. § 567 (Law Co-op. 1980).

An interstate compact sanctioned by Congress under the compact clause is a federal law. Cuyler v. Adams, 449 U.S. 433, 440 (1981). Since its interpretation presents a federal question state law is not determinative. Cuyler, 449 U.S. at 438; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278 (1959).

Though federal law is the ultimate arbiter in the construction of a compact, should North Dakota and Minnesota agree on a definition of "public roadway" it is unlikely a court would reject their interpretation. First of all, a compact is a contract. Green v. Biddle, 5 U.S. (8 Wheat) 346, 364-5 (1823). The judicial task in construing contracts is to give effect to the intentions of the parties. See, e.g., Pennsylvania Ave. Dev. Corp. v. One Parcel of Land, 670 F.2d 289, 292 (D.C.Cir.1981). Furthermore, Justice Holmes, in construing a compact, said "it would be a strange result if this court should be driven to a different conclusion from that reached by both parties concerned." Central R.R. v. Jersey City, 209 U.S. 473, 479 (1908). See also, Petty, 359 U.S. at 278 n. 4; Bush v. Muncy, 659 F.2d 402, 412 (4th Cir.1981), cert. denied, 455 U.S. 910 (1982); F. Zimmerman and M. Wendel, The Law in Use of Interstate Compacts 6 (Council of State Governments 1976). Therefore, it is likely "public roadway" means whatever the two states agree that it means.

Yet since the compact is a federal law a court is not bound by a Minnesota-North Dakota definition of "public roadway." In deciding whether or not to accept an agreed upon definition, a federal court would likely apply principles it uses in those cases where it must decide whether federal or state law controls.

"Controversies ... governed by federal law, do not inevitably require resort to uniform federal rules.... Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'

Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671-72 (1979), quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979).

The considerations are "whether there is a need for a national uniform body of law to apply in situations comparable [to the one at hand], whether application of state law would frustrate federal policy or functions, and the impact a federal law might have on existing relationships under state law." Wilson 442 U.S. at 672-73. In an earlier case the Court said state interests "should be overriden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." United States v. Yazell, 382 U.S. 341, 352 (1966).

Applying the Wilson and Yazell considerations to an agreed upon definition of "public roadway" in the North Dakota-Minnesota compact leads to the conclusion that the states' definition would be given considerable deference. This is because the term "public roadway" is used in a narrow fashion and in an agreement dealing with a narrow issue. There are no obvious overriding federal interests requiring a court to reject an interpretation upon which North Dakota and Minnesota agree. In addition, the interests of the two states in amicably resolving the Red River dike dispute are substantial and it is likely their interpretation of "public roadway" would stand.

If Minnesota and North Dakota fail to agree on a definition of "public roadway," or if a court rejects an agreed upon definition because it contravenes a federal interest or is absurd, the reviewing court would, because construction of the compact presents a federal question, look to federal common law to define the term.

In O'Sullivan v. Brown, 171 F.2d 199 (5th Cir.1948), the court interpreted "public highway" as it appeared in a Texas statute. In defining the term the court drew upon "the accepted definition of a highway or public way in the general law ..." O'Sullivan, 171 F.2d at 201. This law says the "distinguishing characteristics relative to the nature and use of highways is that they be open generally to the public, as a matter of right ..." O'Sullivan, 171 F.2d at 201. The court also said: " 'A public road is a way open to all the people, without distinction, for passage and repassage at their pleasure.' " O'Sullivan, 171 F.2d at 201, quoting 1 Blashfields

Cyclopedia of Automobile Law & Practice. See also Camden v. Harris, 109 F.Supp. 311, 314 (W.D.Ark.1953). In Abbott v. City of Duluth, 104 F. 833, 837 (C.C.D.Minn.1900), aff'd 117 F. 137 (8th Cir.1902), the court generally defined public roads and highways to "include all ways which of right are common to the whole people, and therefore differ from private roads and byways."

There is not, however, a wealth of federal common law on the meaning of "public roadway." Therefore, a court might look to the law of Minnesota and North Dakota for guidance. Neither state, however, has a general all encompassing definition of "public roadway" or similar terms.

Most of the North Dakota cases that refer to "public roadway" or similar terms only do so in reference to a particular statute. See, e.g., State v. Silseth, 399 N.W.2d 868, 869 (N.D.1987). The case of Umpleby v. State, 347 N.W.2d 156 (N.D.1984), however, is helpful. Umpleby was injured when his car went off a curve. The road he was on was an access road between a highway and Lake Oahe. The access road was on federal land though the federal government had licensed the road to the North Dakota State Game and Fish Department. Umpleby said Morton County was liable for his injury because the county, in helping to build the road, improperly designed the curve on which the accident happened. In deciding whether the road was public the court said:

[A]lthough the road is open to the public, it was not intended as an all-purpose public road. It was originally intended as an access road to the corps facility on Lake Oahe and it is now used by the game and fish department. In sum, the road is not a public road in a literal sense. It is merely an access road.... If the corps decided to close the road the county or anyone else would lack effective redress to force it open.

Umpleby v. State, 347 N.W.2d at 160.

While not explicit, the court's view seems to be that a road is public if all members of the public may use it and if the public may prevent its closure. Since the road in Umpleby was not open to the public generally and could be closed by the federal government, it was not a public road. Based on Umpleby, a "public roadway" in North Dakota is a way open to all people for passage and repassage at their pleasure.

The Minnesota Supreme Court, in interpreting a statute allowing for the creation of a public road by prescription, said " 'it is the right of travel by all the world ... which constitutes a road a public highway.' " Quist v. Fuller, 220 N.W.2d 296, 300 (Minn.1974), quoting Anderson v. Birkeland, 38 N.W.2d 215, 219 (Minn.1949). The Minnesota Supreme Court also has said the "approved

legal definition of 'highway' is 'a passage or road through the country ... for the use of the people' " N.W. Tel. Exch. Co. v. City of Minneapolis, 86 N.W. 69, 71 (Minn.1901), quoting Bouv. Law Dictionary. "It seems agreed that the test to be used in determining whether a given roadway is public or private ... turns[s] upon ... the right of the public generally to use the way for vehicular traffic." Merritt v. Stuve, 9 N.W.2d 329, 333 (Minn.1943). See also Bosell v. Rannestad, 33 N.W.2d 40, 43 (Minn.1948).

Based on these cases and the North Dakota case of Umpleby v. State, each state broadly defines "public roadway." The tenor of the decisions is that in North Dakota and Minnesota a "public roadway" is a way open to all people for passage at their pleasure. If a court were to go beyond the law of North Dakota and Minnesota and seek the meaning of "public roadway" from the jurisprudence of other states, the result would be the same. Such jurisprudence also broadly defines "public roadway" as well as similar terms.

In Wyoming a "public road is one that the public generally ... is privileged to use." McQuire v. McQuire, 608 P.2d 1278, 1288 (Wyo.1980). In South Dakota "[i]t is the right of travel by all the world ... which constitutes a road a public highway." Frawley Ranches, Inc. v. Lasher, 290 N.W.2d 366, 369 (S.D.1978).

Other states also broadly define "public roadway." Helpful in establishing this fact is Sumner County v. Interurban Transp. Co., 213 S.W. 412, 413 (Tenn.1919): "A public road is a way open to all the public, without distinction, for passage or repassage at their pleasure. Definitions in other terms have been given, but they mean substantially the same as the one just cited.... And the same definition will be found in the reports of Missouri, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Wisconsin, and perhaps other states." See also Lovvorn v. Salisbury, 701 P.2d 143, ?? (Colo.Ct.App.1985); Davenport v. Cash, 74 So.2d 470, 471 (?? 1950); Kitchens v. Duffield, 76 N.E.2d 101, 105 (Ohio Ct. ?? 1947); Hillsborough County v. Highway Eng'g & Constr. Co., ?? 499, 503 (Fla.1940); Galloway v. Wyatt Metal & Boiler Works, 181 So. 187, 189 (La.1938).

In conclusion, the interpretation of "public roadway" in the compact between North Dakota and Minnesota initially rests with the two states. If they cannot agree on a definition, under federal common law, "public roadway" means a way open to all people for passage and repassage at their pleasure.

II.

To carry out some of North Dakota's duties under the Red River Dike compact, the North Dakota State Engineer brought administrative proceedings against North Dakota landowners with dikes on their

property. These were brought pursuant to N.D.C.C. § 61-03-21.2 that authorized the State Engineer to regulate unsafe and unauthorized dikes. One of the proceedings involved Hilda and Patricia Flynn.

Upon being ordered to lower their dike, the Flynns requested an administrative hearing and a formal hearing was held. The Flynns argued that the structure on their property was not a dike, but a public road. N.D.C.C. § 24-07-01 says public roads may be created by prescription. The Flynns said the historical use of the structure on their property caused it to be a public road. Evidence was received on the issue. In October of 1986 the State Engineer agreed that the Flynn structure was a public road by prescription and did not have to be lowered under the North Dakota-Minnesota compact because Finding No. 6, discussed above in Section I, exempts "public roadways" from regulation.

There is now debate between Minnesota and North Dakota about the meaning of "public roadway" in Finding No. 6. The State Engineer is responsible for these negotiations and the two states may agree on a definition that differs from the State Engineer's interpretation of the term when he decided the Flynn case. This possibility has lead to the inquiry whether the State Engineer may lawfully reopen the Flynn proceeding and modify his order so that it complies with an agreed upon definition.

This issue involves finality of quasi-judicial administrative decisions. The competing interests are the desirability of finality and the desirability of reaching what ultimately appears to be the right result. Civil Aeronautics Bd. v. Delta Air Lines, 367 U.S. 316, 321 (1961). Some courts say administrative agencies have inherent power to reconsider final decisions. See, e.g., Kuhlman v. Township Council of Evensham, 298 A.2d 730, 735 (N.J.1973). Other courts say that since all administrative action must be grounded in statutory authority, the power of an administrative body to modify its quasi-judicial decisions is entirely statutory. See, e.g., Olive Proration Program Comm. v. Agricultural Prorate Comm'n, 109 P.2d 918, 921 (Cal.1941).

In Northern States Power Co. v. Public Service Comm'n, 13 N.W.2d 779 (N.D.1944), the Public Service Commission had set the rate the utility could charge in Fargo. It later set aside the rate for a lower one. Northern States Power contended the Public Service Commission was without power to amend the original order. Northern States Power, 13 N.W.2d at 782. The court said, "[t]he power of the Commission to amend its orders rests entirely upon statutory authority," and then quoted a statute that gave the Commission express authority to alter any of its decisions. Northern States Power, 13 N.W.2d at 783.

Based on this case, one may contend that a North Dakota agency may reconsider its decisions if the legislature has given it the authority to do so. Yet, this proposition cannot be made with full confidence because the Northern States Power case did not directly address the issue. There is, however, other North Dakota authority that denies state agencies the inherent power to modify their orders.

N.D.C.C. § 28-32-14 allows any party before an agency to petition for a rehearing within fifteen days of the order. The last sentence of the provision says: "This section, however, shall not limit the right of any agency to reopen any proceeding under any continuing jurisdiction which is granted to any such agency by any law of this state." Thus, the legislature--the source from which administrative agencies derive power--allows modification of agency orders only where law gives an agency continuing jurisdiction.

No statute specifically gives the State Engineer continuing jurisdiction over matters that have been subject to an administrative hearing and order pursuant to N.D.C.C. § 61-03-21.2. There is no statute which impliedly authorizes the State Engineer to modify an order to change the result nearly a year after issuing the order. Therefore, should North Dakota and Minnesota agree upon a definition of "public roadway" that differs from the State Engineer's understanding of the term in the Flynn proceeding, the State Engineer may not revise his Flynn order.

This Opinion does not necessarily preclude all revisions of quasi-judicial decisions made by state agencies. The agencies probably have the authority to make revisions if they do so within a reasonable time and for the purpose of correcting errors caused by such factors as clerical mistake or fraud. Many courts that otherwise restrict the power of agencies to modify their decisions conclude that agencies have implied authority to correct errors in decisions caused by fraud, surprise, mistake, or inadvertence. This is so particularly when no one is prejudiced by the modification and it is made in a reasonable time. See, e.g., American Trucking Ass'ns, Inc. v. Frisco Transp. Co., 358 U.S. 133, 145 (1958); Hall v. City of Seattle, 602 P.2d 366, 369 (Wash.Ct.App.1979); Redding v. Bd. of County Comm'rs, 282 A.2d 136, 145-46 (Md.Ct.App.1971), cert. denied 406 U.S. 923 (1972); Anchor Casualty Co. v. Bongards Co-op. Creamery Ass'n, 91 N.W.2d 122, 126 (Minn.1958); Drew v. State Liquor Auth., 142 N.E.2d 201, 202 (N.Y.Ct.App.1957).

--EFFECT--

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

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