

**OPINION  
60-130**

October 3, 1960 (OPINION)

**HIGHWAYS**

RE: Public Roads by Prescription - Duty of Township to Maintain

This is in reply to your letter and telephone call in regard to a road or trail in your county.

You inform us that the section through which this road runs has a highway along the west side, a township road along the north and east sides, and that this trail runs along the south side of the section. It is not on the section line because the section line area is so rough and rugged that the cost of construction of a road would not be within reason and would not serve any particular purpose.

Apparently this trail has been used to some extent for thirty and forty years. As soon as it snows in the fall the trail is impassable and is not used until the following spring when the snow is gone. Also, when it rains, the road cannot be used. The road has not been maintained by the township and it is not graveled.

Apparently the road would be of practical use to one individual who does have means of ingress and egress. Also, it would appear that there are several rented cottages on Lake Ashtabula that receive the benefit of the existence of this road.

The owners of the land on which the trail is situated have had some difficulty caused by the fact that during wet weather the people who use the road in attempts to avoid the mud holes drive through the neighboring grain fields, causing damage to the grain. The owners of the land have now attempted to close the road and have posted signs to the effect that it cannot be used.

You ask whether or not this road is a public way or not, whether if it is a public way the township board would be required to grade and gravel it or if not, whether they or the land owners would be obligated to see that it is closed.

By the Public Highway Act of Congress, dated July 26, 1866, providing that: "The right of way for the construction of highways on public lands not reserved for public uses is hereby granted", it would appear that the United States granted to the Territory of Dakota such road rights of way as were acceptable to the territorial government. This grant was accepted by chapter 33 of the Session Laws adopted by the territorial Legislature of 1871, providing that "hereafter all section lines in this territory shall be and hereby are declared public highways as far as practicable." (See: Walcott Tp. of Richland County v. Skauge, 71 N.W. 544, 6 N.D. 382, Koloen v. Pilot Mound Tp. 157 N.W 672, 33 N.D. 529, L.R.A. 1917A 350, Faxon v. Civil Tp. of Lallie, Benson County, 39 S. Ct. 491, 250 U.S. 634, 63 L.

Ed. 1182 Huffman v. Board of Sup'rs of West Bay Tp. Benson County, 182 N.W. 459, 47 N.D. 217 and Hillsboro Nat. Bank v. Ackerman, 189 N.W. 657, 48 N.D. 1179.)

By reason of subsequent amendments and codifications the original territorial statute, now embodied in section 24-0703 of the North Dakota Revised Code of 1943 provides:

24-0703. SECTION LINES CONSIDERED PUBLIC ROADS. In all townships in this state outside the limits of incorporated cities and villages, the congressional section lines shall be considered public roads, to be opened to the width of two roads on each side of such section lines, where the same have not been opened already upon the order of the board having jurisdiction, without any survey being had, except where it may be necessary on account of variations caused by natural obstacles, subject, however, to all the provisions of this chapter in relation to assessments of damages."

If, of course, this road did follow the section line, except, of course, for variations caused by natural obstructions, it would appear that same would be a public road under that statute. However, by reason of the public use of the road, it would appear that a public road has been established, under section 24-0701 of the North Dakota Revised Code of 1943, if not under section 24-0703. Said section provides:

24-0701. PUBLIC ROADS BY PRESCRIPTION. All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not."

It would thus appear that this "trail" is an open and public road. The township board could, of course, vacate same (See: Section 24-0705 of the North Dakota Revised Code of 1943.) The landowners as such would have no right to close the road by the type of actions they have taken. There are, of course, statutory penalties for "obstructing highways". (See: Chapter 24-12 of 1957 Supplement to the North Dakota Revised Code of 1943). In proper circumstances an injunctive proceeding could be brought to prevent such obstructions as you mention. However, a proceeding under the statutory penalties would appear at first glance to be a simpler method of preventing such obstructions.

You mention that the township board has committed itself to an extensive program of road construction and graveling and that at the present time their road fund is not adequate to provide the services the farmers residing in the township desire. The township board does have some discretion in the determination of where the township road funds will be expended. (See: Chapter 24-06 of the North Dakota Revised Code of 1943). On this basis, it would appear that there would not be any obligation on the part of the township board to expend road funds on this part of the township road system.

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