

Stutsman County State's Attorney's Office

Stutsman County Courthouse
511 2nd Ave. S.E.
Jamestown, N.D. 58401

Fritz Fremgen, State's Attorney
Jay A. Schmitz, Chief Assistant State's Attorney
Troy J. LeFevre, Assistant State's Attorney
Joan Y. Halvorson, M.Ed. Victim/Witness Coordinator
Cindy Holzkamm, Administrative Coordinator

Phone: (701) 252-6688
Fax: (701) 251-6369

November 16, 2007

Mr. Kevin Carlson
2890 68th Ave. SE
Buchanan, ND 58420

Re: 07-035-SA, Deer Lake Township, Right of Way Maintenance

Dear Chairman Carlson:

I've received township road questions from Glacier, Woodbury, and Deer Lake townships.

On the 29th of November 2007, when the Township Officers Association Meeting is scheduled, I am already obliged to conduct a jury trial on an inmate of the JRCC charged with writing inappropriate correspondences to a public official. You are welcome to share this letter with all the members of the Association. If my jury trial settles or ends early in the day, I plan to attend the meeting.

I.

You asked what Deer Lake Township can do when a farmer tills, plants, and harvests so close to the ditch of a township road that it makes a crest of dirt at the top of the out-slope and steepens the once gradual 1 to 3 grade of the out-slope into an abrupt embankment.

II.

You asked whether the Township can tell farmers who plant a tall crop such as corn in the 33 foot easement of a township road not to do that and what the Township can do about it if the farmer persists despite the notice.

Usually, townships do not want to prosecute their residents criminally, but prefer to repair damage and add the cost of repair as a tax against the land. The statutes that address township roads and provide for appending the cost of repair to property taxes, and their limitations, follow.

- A. **North Dakota Century Code section 24-06-26.2**, (below), allows for applying a township's cost to repair to the offending owner's property taxes, but it can only be used under a very specific set of circumstances. The township can only use this section when "improper conservation practices" cause "unreasonable" and "uncommon" "wind and water erosion" that adversely affect the ditch.

§ 24-06-26.2 Maintenance of township road ditches - Limited duty.

The party with an interest in land adjacent to a township road is not responsible for maintaining that ditch unless improper conservation practices on that party's adjoining land have led to unreasonable wind and water erosion, not commonly experienced in the locality, which resulted in conditions adversely affecting the ditch. On the occurrence of such improper conservation practices, the board of township supervisors may require the adjoining party with an interest in the land to clean the ditch at that party's expense. If that party fails to clean the ditch, the procedures applicable to the duty to cut weeds under chapter 63-05 apply with respect to the cleaning of the ditch.

Whether farming close to the ditch so it extends the surface of the field and narrows the ditch constitutes improper conservation practices is certainly something parties can argue over. Another difficulty with this statute is it's aimed at practices that let the wind or run off drag the soil into the ditch. So it's not just the tilling that has to push it in, this section requires an intermediate intervening cause, erosion, to be present. Finally, it also requires the ditch filling to be at an uncommon rate for the locality.

- B. **North Dakota Century Code section 24-06-27** (below) requires anyone who injures a ditch opened as provided in section 24-06-26 to pay double the damages caused by highway injury to the overseer of highways (see North Dakota Century Code chapter 58-12 on appointment of township road overseer).

Section 24-06-27 only applies when the ditch was built pursuant to the process outlined in 24-06-26 (**attached**). Additionally, to collect those double damages, the township has to obtain a judgment against the offender either by bringing its own civil action or by getting a successful criminal investigation and prosecution.

§ 24-06-27. Penalty for injuring ditch

Any person who obstructs or in any way injures any ditch opened as provided in section 24-06-26, is liable to pay to the overseer of highways of such road district double the damages caused by such injury, which must be assessed by the jury or court, and also is guilty of a class B

misdemeanor, and the civil damages, when collected by the overseer, must be deposited in the road fund established by section 24-06-17, and must be expended in accordance with section 24-06-19.

- C. **North Dakota Century Code section 24-06-29** (below) applies to “stones, trees, and rubbish” and allows the township to notify the landowner or person in possession of the property that they have to remove them within 30 days and if they don’t, the township will remove them and enter the cost as taxes against the land.

Unfortunately, section 24-06-29 only applies to the extremely rare situation of the reopening of the section line that was at one time closed pursuant to 24-07-03 (petition the county board, public hearing, etc.). This limit is in the plain language of the section and recognized in a June 18, 1997 Attorney General’s opinion 97-L-66 (**attached**). Some officials and lawyers who may not be aware of the AG’s interpretation of this statute may disagree with me and believe this statute can be used any time in the life of a road, regardless of whether the road has ever been closed and reopened.

§ 24-06-29 Removal of obstructions when section lines opened - Cost.
If any person places or causes to be placed any stones, trees, or rubbish within thirty-three feet [10.06 meters] of any section line, the board of county commissioners or board of township supervisors, as the case may be, when a public highway is opened along the section line, shall notify the owners of adjacent property to remove the stones, trees, or rubbish. Written notice by registered mail to the record owner of the adjacent property mailed to the owner's last-known address and to any other persons in possession of the property constitutes valid notice. If the owners fail to remove the stones, trees, or rubbish within thirty days after the notice is mailed, the board of county commissioners or the board of township supervisors, as the case may be, shall remove the stones, trees, or rubbish. The cost of removal must be entered the same as taxes against the adjacent property and paid in the same manner as taxes.

- D. **North Dakota Century Code sections 24-12-01, 24-12-02, and 24-06-28** (below) are criminal statutes. A person found guilty of violating either one is guilty of a class B misdemeanor, can be ordered to pay restitution for the cost of repair of the damages, and faces a maximum potential sentence of up to 30 days in jail and/or a \$1,000 fine.

Using a criminal statute requires first a successful law enforcement investigation and then a successful prosecution. Somebody, usually a resident of the township, has to report their neighbor to law enforcement and is a probable witness at the criminal trial. At trial, hearsay is generally not allowed, and I need to prove beyond a reasonable doubt that the charged individual is the very person who caused the damage.

In the past few years, I have prosecuted to conviction several cases involving obstructing section lines usually by pairing charges of disorderly conduct with obstructing a section line. (e.g. Jesse Swift, Jackie Nannenga, and James Trautman). I have also lost two, State v. Jim Nannenga where there was insufficient proof of his involvement in placing the posts in the line and State v. Blahna, where the judge said since Blahna's corner posts did not completely obstruct the entire 66' easement they didn't constitute an *obstruction*.

Section 24-12-01 "Injuries to highways" is the best statute I've found to address a township ditch damage situation like the one you've described. Since it's a crime to violate this section. You need to start by calling the sheriff for an investigation.

§ 24-12-01 Injuries to highways.

No person may willfully dig up, remove, displace, break, or otherwise injure or destroy any public highway, right of way, or bridge, or any rest area, picnic area, or tourist camp, or improvements thereon, operated in connection with a public highway, or any private way laid out by authority of law, or any bridge upon such way without first securing permission from the person or governing body having jurisdiction and control thereof.

Section 24-12-02, "obstructing highways" requires more than just plowing up a section line, or a township road that lays on a section line. After a farmer named Mr. Silseth was convicted, in the mid 80s, of violating 24-12-02 by simply plowing up and planting a section line, the legislature changed 24-12-02 to specify that plowing only constitutes a crime if the plowing *is done in a manner so as to obstruct usual travel*. *State v. Bossart*, 1997 ND 119, 565 N.W.2d 752 (citing *State v. Silseth*, 399 N.W.2d 868 (N.D. 1987)). So, damage to a ditch is going to have to be really severe to actuate this statute.

24-12-02 Obstructing highways.

No person may:

1. Obstruct any public highway in any manner with intent to prevent the free use thereof by the public;
2. Willfully and knowingly obstruct or plow up, or cause to be obstructed or plowed up, any public highway or right of way, except by order of the officials having jurisdiction over such highway for the purpose of working or improving the same;
3. Build or place a barbed wire fence across any well-traveled trail which has been the usual and common route of travel for not less than one year without placing on the outside of the top tier of barbed wire on said fence a board, pole, or other suitable protection, to be at least sixteen feet [4.88 meters] in length; or
4. Plow up a section line in a manner so as to obstruct usual travel on the section line.

Section 24-06-28 “Obstructing a section line” also requires the obstruction to actually impede travel. So, damage to the ditch isn’t likely to satisfy the requirements of 24-06-28. But if the plowing is severe enough to actually stop travel, we may be able to apply 24-06-28 to a township road lying on a section line.

§ 24-06-28 Obstruction of section lines prohibited - Exception - Certain fences not considered obstructions - Penalty.

1. No person may place or cause to be placed any permanent obstruction, stones, trees, or rubbish within thirty-three feet [10.06 meters] of any section line, unless written permission is first secured from the board of county commissioners or the board of township supervisors, as the case may be. The permission must be granted where the section line has been closed pursuant to section 24-07-03 or where the topography of the land along the 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.
2. Subsection 1 may not be construed to prohibit construction of fences:
 - a. Along or across section lines which have been closed pursuant to section 24-07-03 or which have not been opened because construction of a road is impracticable due to the topography of the land along the section line, but such fences are subject to removal as provided in section 24-06-30.
 - b. Across section lines which have not been closed pursuant to section 24- 07-03 if cattle guards are provided in accordance with chapter 24-10 where fences cross the section lines.
3. The construction of fences pursuant to subsection 2 may not be considered an obstruction of section lines and any person who damages any fence or who opens and fails to close any gate constructed under subsection 2 is guilty of an infraction.

II

Your second question stemmed from your concern that where a tall crop, e.g. corn, is in the 33' easement, deer will run out of the crop, surprise the driver, collide with the car, and the township will be sued.

You had suggested you were concerned that people sue these days for millions. North Dakota Century Code § 32-12.1-03 does contain a \$500,000 cap on the amount of township liability. Additionally, in 32-12.1-03(6) there is a specific bar to liability for claims related to roads

designated as minimum maintenance under 24-07-35 through 24-07-37 if the roads are reasonably maintained at a level to serve occasional and intermittent travel.

Generally, “[t]he view has been taken that a municipality owes motorists a duty to maintain, in a reasonably safe condition, the immediate area adjacent to highways or streets likely to be used by the traveling public.” And it has been recognized that a city may be held liable where the proximity of obstructions or defects outside the traveled or improved portion of the street render it probable that injury may result to those using the improved portion of the street in an ordinary manner while exercising due care. *McQuillan, Municipal Corporations*, 54:47 *Liability for Defective Streets, Width of way—traveled portion* (citing 19 A.L.R. 4th 532); see also *Braatz v. Fargo*, 125 N.W. 1042 (N.D. 1910) and its progeny.

Rural roads, however, are a different class. “It is generally held that the duty of a county or township to maintain rural highways in a reasonably safe condition extends only to the improved or traveled portions of such roads.” 39 American Jurisprudence 2d Highways, Streets, and Bridges § 393—Rural ways.

Responsibility in your scenario is difficult to predict because it combines both the crop in the easement and deer that bound out of the crop onto the road.

A high crop like corn may constitute what’s called a visual obstruction. Some courts have held a government liable for allowing a visual obstruction to remain in the easement if they find that the object was the cause of the accident. See 22 ALR 4th 624, *Governmental Liability for Failure to Reduce Vegetation Obscuring View at Railroad Crossing or at Street or Highway Intersection*. Often these cases involve trees or bushes blocking stop signs. The best related North Dakota case I’ve found, *Belt v. City of Grand Forks*, 68 N.W.2d 114 (N.D. 1955) held that the city was within its rights to improve only the middle 30 feet of the 80 foot easement it had and the Court recognized that “a municipality is not liable to an occupant of an automobile injured in a collision at an intersection merely because it has allowed the view to be obstructed by high grass, weeds and bushes which have grown up in a portion of the street not maintained for public travel.” *Belt*, 68 N.W.2d at 120.

I’ll put deer in the category, *moving objects*. Courts seem reluctant to hold a government liable for accidents caused by moving objects on the roadway such as, cattle, horses, or goats. *McQuillan, Municipal Corporations*, 54:103 *Liability for Defective Streets, Moving objects*.

I did find an article on liability for failing to post signs for deer. 59 ALR 4th 1217, *Governmental Liability for Failure to Post Highway Deer Crossing Warning Signs*. New York leans towards the idea that the government is not responsible for warning about deer.

We observe that unlike its public highways which a municipality controls and for which it is responsible, deer in their natural state are wild animals which it cannot control. Thus, it seems reasonable to conclude that a municipality should be and is

“duty bound to construct and maintain its highways in a reasonably safe condition * * * and to warn users of its highways of existing hazards”but that there is no comparable legal duty to protect highway users from or to warn them of the dangers of collision with wild deer.

Ufnal v. Cattaraugus County, 93 A.D.2d 521, 525, 463 N.Y.S.2d 342, 345 (N.Y.A.D. 4 Dept.,1983). I have to recognize that the Manual on Uniform Traffic Control Devices (available for free at <http://mutcd.fhwa.dot.gov/pdfs/2003/pdf-index.htm>) contains directions on how to post warning signs for deer. Just because New York has not imposed liability in a couple of cases doesn't mean every municipality is free to decide not to sign for deer and is totally without liability exposure if it decides not to sign.

At least one state, New York, seems to consistently hold that the state is not liable for injuries or damages resulting from highway accidents between the public and wild animals. *Massar v. New York State Thruway Authority*, 228 NYS2d 777 (1962). *Leslie v. State*, 120 A.D.2d 905, 502 N.Y.S.2d 825.

In over a day of research, I did not come across a single case in which a government was held liable for failing to control crop in the easement of a rural road which act or omission supposedly led to deer charging into a motorist. Typically, courts will find that if the “city” didn't scare the animal into the highway, that the city isn't going to be liable for the motorist's collision with the animal. *McQuillan, Municipal Corporations*, 54:103 *Liability for Defective Streets, Moving objects*. and 39 American Jurisprudence 2nd Highways, Streets, and Bridges, Proximate Cause § 374-376.

Potential Township Responses

The township can tell people not to plant crops inside the 33' easement of a township road. If the owner persists, the township can consider the following responses.

- A. **North Dakota Century Code section 24-06-31** (below) provides authority to the overseer of highways to remove obstructions from highways. (See North Dakota Century Code chapter 58-12 on appointment of township road overseer).

§ 24-06-31 Obstructions in highways

Each overseer of highways having personal knowledge, or being notified in writing, of any obstruction in the highway of public street in his district, immediately shall remove or cause any such obstruction to be removed.

The only mention I find of exercising this power is two attorney general opinions: Attorney General Opinion 81-75, dated July 13, 1981 to Owen Mehrer and AG's Opinion 85-45, dated December 9, 1985 to Assistant Cass County State's Attorney Keith Reisenauer. I find no North Dakota case in which the overseer tilled up, combined, or cut down a farmer's crop in the 33' easement of the township road laying on a section

line. Obviously, the overseer and his associates may find themselves sued. I did find a related case from another jurisdiction in which a private party was charged criminally for mowing down wheat of another that was growing in the highway right of way. The criminal charge was dismissed on the grounds that the wheat was a nuisance per se. *State v. Deines*, 268 Kan. 432, 440, 997 P.2d 705, 710 (Kansas 2000), see also 39 American Jurisprudence 2nd Highways, Streets, and Bridges, § 279 (indicating the government has the right to clear its right of way of obstructions).

I've found no case law that discusses whether the "obstruction" mentioned in 24-06-31 must actually impede travel as is required of plowing in 24-12-02(4).

- B. Check the statutes I've set out above in section I, and their limits, to see if any could despite their limits apply to the particular field you have in mind.
- C. If none of the above statutes will apply, the township can approach its private attorney about bringing a civil law suit to enjoin the land owner from infringing on the township's easement.
- D. A possibility that's been mentioned under these circumstances, but that I've never heard of anyone actually using is an action under NDCC 42-02 to abate a 42-01-01 nuisance. See ND AG's Opinion 85-45, dated December 9, 1985 to Assistant Cass County State's Attorney Keith Reisenauer.

To constitute a nuisance, the crop would have to "render [the street or highway] dangerous for passage". The argument that I would anticipate coming from the landowner is: it's not the corn that renders passage dangerous, it's the deer and the motorist's speed.

If you are going to consider pursuing the nuisance claim, I recommend you first contact your NDIRF agent and the township's private legal advisor. If the township declares this condition a nuisance on the grounds that it constitutes a danger, it seems to me it may be buying itself a permanent obligation to abate a situation, when the township could legitimately argue it has no such obligation.

Sincerely,



Fritz Fremgen
State's Attorney
Stutsman County

24-06-26 Ditches to drain highways - Proceedings to establish.

Whenever any overseer of highways files with the board of township supervisors or with the board of county commissioners, as the case may be, the overseer's affidavit stating that a certain road in the overseer's district runs into or through swamp, bog, meadow, or other lowland, and that it is necessary or expedient that a ditch should be constructed and maintained through land belonging to any person, and also stating the probable length of such ditch and the width and depth of the same as near as may be, the point at which it is to commence, its general course and the point at or near which it is to terminate, the names of the persons owning the land, if known, and a description of the land over which such ditch must pass, the board of township supervisors or board of county commissioners, as the case may be, if the right to construct and maintain such ditch is not given voluntarily by the person owning the land over which it is to pass, shall cause proceedings to be instituted in its name under the provisions of chapter 32-15 to acquire the right to construct and maintain the same.

1997 N.D. Op. Atty. Gen. L-66

*204 Office of the Attorney General
State of North Dakota

June 18, 1997

Ms. Jeanne McLean Behrens
Bottineau County State's Attorney
314 East 5th Street
Bottineau, ND 58318

Dear Ms. Behrens:

Thank you for your letter asking several questions regarding fencing along a section line.

In North Dakota, the congressional section lines are public roads and are open for travel outside the limits of incorporated cities and outside properly recorded platted townsites, additions, or subdivisions. N.D.C.C. § 24-07-03. A section line easement outside of city limits or plated areas may be closed to travel only under limited circumstances as set out in N.D.C.C. § 24-07-03. The board of county commissioners may be petitioned by a person having an interest in land adjoining a section line to close the section line. The commission must hold a public hearing and make a finding of public benefit and also a finding that either the portion of the section line road desired to be closed has not been used for ten years, is not traveled due to natural obstacles or difficulty of terrain, is not required due to readily accessible alternate routes of travel, or is intersected by interstate highways causing the section line to become a dead end, provided that the closing of such a dead end does not deprive adjacent land owners access to their property. N.D.C.C. § 24-07-

03.

Your first question concerns N.D.C.C. § 24-06-28. This section provides that "[n]o person may place or cause to be placed any permanent obstruction, stones, trees, or rubbish within thirty-three feet [10.06 meters] of any section line, unless written permission is first secured" You ask whether a fence is considered a permanent obstruction as used in this section. The North Dakota Supreme Court has held that fencing within a section line easement is an obstruction if done in violation of certain provisions which allow a board of county commissioners or a board of township supervisors to grant written permission for such fencing within limited parameters. Small v. Burleigh County, 225 N.W.2d 295 (N.D. 1974) (Small I); Small v. Burleigh County, 239 N.W.2d 823 (N.D. 1976) (Small II); Saetz v. Heiser, 240 N.W.2d 67 (N.D. 1976). Therefore it is my opinion that fencing within the section line easement is a permanent obstruction of that easement which is not permitted unless written permission is first secured from the appropriate board pursuant to law.

Your second and third questions concern the operation of N.D.C.C. §§ 24-06-29 and 24-06-30. N.D.C.C. § 24-06-29 concerns the removal of stones, trees, or rubbish from within a section line easement when the easement is opened and N.D.C.C. § 24-06-30 concerns the removal of fences when a section line easement is opened. Both sections permit the cost of removal to be taxed against the land if the landowner does not remove the obstructions after being notified to do so. These statutes each

1

Not "highway"
Magically AG is using word "easement"

address the same general topic of removing obstructions from section line easements when a public highway is opened along the section line. N.D.C.C. § 24-06-29 is not applicable to fencing because it does not refer to fencing, while N.D.C.C. § 24-06-30 specifically states that it concerns fencing. See N.D.C.C. § 1-02-07.

N.D.C.C. § 24-06-30 provides:

When a public highway is opened along any section line, the board of county commissioners or the board of township supervisors, as the case may be, shall notify the owner of adjacent property to remove any fences not constructed pursuant to subsection 2 of section 24-06-28 within thirty-three feet [10.06 meters] of the section line in the manner provided for notice to remove stones, trees, or rubbish. If the owner of adjacent property fails to remove the fences within thirty days after the notice is given, the board of county commissioners or the board of township supervisors, as the case may be, shall remove the fences. The cost of removal must be entered the same as taxes against the adjacent property and paid in the same manner as taxes.

N.D.C.C. § 24-06-30 provides for the removal of fencing from within section line easements when the fencing was erected according to law or proper authorization. Fences along or across section lines which have been closed pursuant to N.D.C.C. § 24-07-03 or which have not been opened because construction of a road is impractical due to the topography of the land along the section line are not prohibited by N.D.C.C. § 24-06-28; however, the fence is subject to

removal under N.D.C.C. § 24-06-30. N.D.C.C. § 24-06-28(2)(a). Further, if a section line has not been closed pursuant to section 24-07-03, a fence may be placed across the section line pursuant to N.D.C.C. ch. 24-10. N.D.C.C. § 24-06-28(2)(b). Any fencing across section line easements under N.D.C.C. ch. 24-10 may be ordered removed if the required cattle guards are not kept in repair or if the appropriate board determines that it is necessary to remove the cattle guard and gateway for the purpose of improving the highway or section line. N.D.C.C. § 24-10-04. Fencing may also be placed in the section line easement by a grant of permission from the board of county commissioners or the board of township supervisors, but if it obstructs the public's right to travel, it must be removed. See Burleigh County Water Resource District v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994). See also Letter from Attorney General Heidi Heitkamp to Cynthia Feland (December 19, 1996) (county or township board may grant permission for fencing along section line within easement if fencing does not effectively deprive public of ability to travel within easement, but fencing may have to be removed at landowner's expense).

*205 The provisions of N.D.C.C. § 24-06-30 apply only if a condition precedent is satisfied: "[w]hen a public highway is opened along any section line . . ." N.D.C.C. § 24-06-30 (emphasis supplied). See 1981 N.D. Op. Att'y Gen. 207, 210; Letter from Assistant Attorney General Gerald W. VandeWalle to Charles Crane (May 16, 1968) (N.D.C.C. §§ 24-06-28, 24-06-29, and 24-02-30 apply when public body acts to build a public road).

Under N.D.C.C. § 24-07-03, section

lines outside of incorporated cities or outside of properly recorded platted townsites, additions, or subdivisions are public roads open for travel. See State v. Silseth, 399 N.W.2d 868, 869 (N.D. 1987) (term "public road" in N.D.C.C. § 24-07-03 is the same as "public highway" under N.D.C.C. § 24-12-02(2)). Under normal circumstances, the only time that a public highway will be opened along a section line is when the section line is reopened after having been closed by law. See 1994 N.D. Op. Att'y Gen. L-134 (April 29 letter to Mahoney) (county may reopen section line road previously closed under N.D.C.C. § 24-07-03). N.D.C.C. § 24-07-03 also implies that if a section line easement in an incorporated or platted area subsequently is no longer within an incorporated city or platted area by vacation of the plat, deannexation, or otherwise, then the formerly closed section line easement would be opened. See 1996 N.D. Op. Att'y Gen. 89; Letter from Attorney General Heidi Heitkamp to Ronald Reichert (January 16, 1997) (section line easement remains when incorporated into city limits and may subsequently be reopened under law). Therefore, the references in N.D.C.C. §§ 24-06-29 and 24-06-30 to opening a section line apply if a section line has been closed under or by operation of N.D.C.C. § 24-07-03 and is subsequently reopened.

Several opinions of the North Dakota Supreme Court and of this office have implied that N.D.C.C. §§ 24-06-29 and 24-06-30 apply in any instance when an obstruction is sought to be removed from a section line easement and have not limited the application of these sections to instances when a public highway is being opened. See, e.g., Burleigh County Water Resource Dist.,

Ames v. Rose Twp. Board of Twp. Supervisors, 502 N.W.2d 845 (N.D. 1993), Small I, 1995 N.D. Op. Att'y Gen. L-101 (April 24 letter to O'Connell). Those opinions addressed the question whether an obstruction was in violation of the law. However, they did not discuss what governmental authority required the landowner to remove the fence or obstruction if it was found to be in violation of law, nor did the opinions address the specific statutory language of N.D.C.C. §§ 24-06-29 and 24-06-30 stating that those statutes apply when a public highway is opened along a section line.

These prior opinions are not strong authority for the proposition that N.D.C.C. §§ 24-06-29 and 24-06-30 apply when a public highway has always been open, as opposed to being opened, along a section line. Opinions must be read in light of the facts presented and the problem that the court was then considering. Dickinson Educ. Ass'n v. School Dist., 499 N.W.2d 120, 125 (N.D. 1993). Comments in opinions which are not essential to the determination and not involved in the action are dictum and are not controlling in subsequent cases. Bakke v. St. Thomas Public Sch. Dist. No. 43, 359 N.W.2d 117, 120 (N.D. 1984).

"When interpreting a statute, however, we are bound to give meaning and effect to every word, phrase, and sentence." First State Bank v. Moen Enterprises, 529 N.W.2d 887, 891 (N.D., 1995). "All sections of a statute must be construed to have meaning because the law neither does nor requires idle acts." County of Stutsman v. State Historical Soc., 371 N.W.2d 321, 325 (N.D. 1985). "Statutes must be read to give effect to all of their provisions, so that no part of the statute

is inoperative or superfluous." Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 148, 157 (N.D. 1996). Therefore, in order to provide meaning to each word of these statutes, it is my opinion that N.D.C.C. §§ 25-06-29 and 24-06-30 only apply when a public highway is being opened along that portion of the section line easement.

There is a different legal remedy for removing fencing from a section line easement which was not fenced according to law. N.D.C.C. § 24-12-02 prohibits the obstruction of public highways or rights-of-way. N.D.C.C. § 24-12-02 has been held to apply to section line easements even where the section line has not been specifically opened or improved. Silseth, 399 N.W.2d at 869-870. A violation of N.D.C.C. § 24-12-02 is a class B misdemeanor. N.D.C.C. § 24-12-05. Fencing placed within the section line easement without specific permission from the appropriate board or placed in violation of statutory authorization may be found to violate N.D.C.C. § 24-12-02. See Silseth. A person found guilty of an offense may be ordered to pay restitution for damages resulting from the offense or to restore damaged property. N.D.C.C. § 12.1-32-02(1)(e) and (f). Damages, in such a case, would include the cost of removing the fence and restoring the section line to the condition it would have been in if it had not been fenced. Letter from Attorney General Heidi Heitkamp to Jeffrey J. Peterson (November 22, 1996).

*206 Another option to abate an illegal fence obstructing an open section line easement is to bring an action for an injunction requiring the fence to be removed. 1960-1962 N.D. Op. Att'y Gen. 130. An injunction may be obtained to abate a

nuisance. N.D.C.C. § 32-05-02. A nuisance is an unlawful act or omission which unlawfully interferes with, obstructs, or tends to obstruct a street or highway. N.D.C.C. § 42-01-01(3). A public nuisance may be abated by any public body or officer authorized by law. N.D.C.C. § 42-01-09. State statutes also authorize certain governmental authorities to remove obstructions in a public highway. See, e.g., N.D.C.C. §§ 24-05-17 (counties), 24-06-01 (townships).

The United States offered the section line easements to the Dakota Territory and the North Dakota Legislature, and this offer was accepted. Ames, 502 N.W.2d at 847. The North Dakota Supreme Court has held "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 trustee for the public." Saetz, 240 N.W.2d at 72. Therefore, it is my further opinion that fencing within a section line easement is only temporary, albeit for an indeterminate length of time, and may be removed under appropriate statutory procedures depending upon the nature of the authorization, or the fact that there was no authorization, to build the fence. Prior opinions of this office which conflict with this opinion are overruled to the extent of the conflict.

Sincerely,

Heidi Heitkamp

Attorney General

Does it
= Completely obstruct = + C.O.
Doesn't need to be accorded to
Burlough 510 + 624

Stutsman County State's Attorney's Office

Stutsman County Courthouse
511 2nd Ave. S.E.
Jamestown, N.D. 58401

Fritz Fremgen, State's Attorney
Jay A. Schmitz, Chief Assistant State's Attorney
Troy J. LeFevre, Assistant State's Attorney
Joan Y. Halvorson, M.Ed. Victim/Witness Coordinator
Cindy Holzkamm, Administrative Coordinator

Phone: (701) 252-6688
Fax: (701) 251-6369

November 16, 2007

Ms. Donna Geske
6440 10th Street SE
Pingree, ND 58476

Re: 07-014-SA, Glacier Township, Must Feds Mow Ditch
07-015-SA, Glacier Township, Damage Road and Ditch

I've received township road questions from Glacier, Woodbury, and Deer Lake townships.

On the 29th of November 2007, when the Township Officers Association Meeting is scheduled, I am already obliged to conduct a jury trial on an inmate of the JRCC charged with writing inappropriate correspondences to a public official. You are however, welcome to share this letter with all the members of the Association.

Glacier's questions in "07-015-SA, Glacier Township, Damage Road and Ditch", about how to address damages to road and ditches should be addressed by the enclosed November 16, 2007 opinion, 07-035-SA to Deer Lake township.

You asked what the township could do to make the federal government who owns land abutting a minimum maintenance township road mow the ditch.

The Century Code remedy of applying costs to the property taxes of the landowners does not apply when the landowner is the federal government.

As you know, under North Dakota Century Code section 63-05-03, the township that cuts the grass for the landowner (after proper notice under 63-05-02) can certify the expenses to the county auditor who can then charge them as taxes are against the land of the owner. Federal land used by the federal government is generally exempted from state taxation. I find no authority for the county auditor to tax the federal entity's real property when it is the federal government who is holding and using the land.

That leaves you with no feasible legal remedies. I doubt you are going to want to try to bring a civil law suit for the collection of a hundred dollars or less in damages against the federal government. Actions against the federal government are to be brought in federal court, not Stutsman County small claims court.

Weed officers have also told me they suffer with what they feel is a lack of cooperation on the part of the federal agency to control weeds. My recommendation is similar in both cases. The federal government is pretty sensitive to the chain of command concept. I'd suggest starting again nicely with the local agency representative and diplomatically work up the chain of the federal entity explaining why it is important to your township that the grass gets mowed and asking for their understanding and cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Fritz Fremgen', written over a large, loopy circular flourish.

Fritz Fremgen
State's Attorney
Stutsman County

Stutsman County State's Attorney's Office

Fritz Fremgen, State's Attorney

Jay A. Schmitz, Chief Assistant State's Attorney

Troy J. LeFevre, Assistant State's Attorney

Joan Y. Halvorson, M.Ed. Victim/Witness Coordinator

Cindy Holzkamm, Administrative Coordinator

Stutsman County Courthouse
511 2nd Ave. S.E.
Jamestown, N.D. 58401

Phone: (701) 252-6688
Fax: (701) 251-6369

November 16, 2007

Mr. Duane Andersen
8176 38th Street SE
Jamestown, ND 58401

Re: 07-015-SA, Woodbury Township, Close Township Road During Rainy Periods

Dear Duane:

I've received township road questions from Glacier, Woodbury, and Deer Lake townships.

On the 29th of November 2007, when the Township Officers Association Meeting is scheduled, I am already obliged to conduct a jury trial on an inmate of the JRCC charged with writing inappropriate correspondences to a public official. You are welcome to share this letter with all the members of the Association. If my jury trial settles or ends early in the day, I plan to attend the meeting.

You let me know that when it rains enough to get the roads soft, people come out with their trucks and use your township roads as four-wheeler playgrounds, digging up the roads and leaving deep ruts. You said this happens a few times a year costing a few hundred bucks each time.

You asked whether the township could close the road.

If it did close the road, who would enforce it.

Could you post flip down signs that you unfolded after the rain to reveal a "road closed" notice.

The only authority I could find for a road closing at the township's request was under 24-07-03. That process is not speedy and it's not designed at all to be temporary. It's not at all a suitable remedy.

Under NDCC § 39-10-21.1, the Sheriff can close a road if there are hazardous conditions. That section follows.

39-10-21.1 Closing road because of hazardous conditions - Posting of official traffic-control devices - Entering closed road prohibited.

The highway patrol or local law enforcement authorities having jurisdiction over a road may close a road temporarily due to hazardous conditions for the protection and safety of the public. If such a closing is made, the authority ordering the closing shall make every reasonable attempt to notify the public and, when practical, may post appropriate official traffic-control devices to advise motorists of the closing. No person, while operating a motor vehicle, may knowingly enter a road closed under this section.

Violation of this section is an infraction, which is punishable by up to a \$500 fine. No jail is available. Restitution for repair to the road is available.

Another law with potential usefulness here is exhibition driving. 39-08-03.1. If it's just a section line they are tearing up, I don't see 24-12-01 applying. Perhaps we could try criminal mischief under 12.1-21-05.

In any of these statutes, law enforcement has to either catch them at it, get a confession from the suspect that he was the driver, get reliable witnesses who can identify the suspect as the driver, or (a very rare one) collect circumstantial and direct evidence proving who the driver was.

Sincerely,

A handwritten signature in black ink, appearing to read 'Fritz Fremgen', written over a circular stamp or mark.

Fritz Fremgen
State's Attorney
Stutsman County