

OFFICIAL OPINION NO. 79-9, Highway right-of-way by prescription, SDCL 31-3-1

April 10, 1979

Mr. Richard E. Bleau
State's Attorney
Campbell County
Herreid, South Dakota 57632

Official Opinion No. 79-9

Highway right-of-way by prescription, SDCL 31-3-1

Dear Mr. Bleau:

You have requested an official opinion from this office based upon the following factual situation:

FACTS:

The road in question is a dirt road in Campbell County that travels westward from State Highway 1804 for approximately 5 miles to the Oahe Reservoir. Starting at Highway 1804 the road goes due west for 1/2 mile along the section line between Sections 17 and 20 in Township 127 W. Range 78 N. From this point the road goes due north for 1/2 mile to the center of Section 17 and then again due west 1/2 mile to Section 18 of Township 127 W. Range 78 N. From this point the road takes a meandering course following a ridge line as it traverses Section 18, Township 127 W. Range 78 N., Section 13, Township 127 W. Range 79 N. and Section 14, Township 127 W. Range 79 N. (See map exhibit A.)

The terrain is river hills which comprise the drainage area for the Missouri River. The area is hilly with deep cuts, draws and gullies which makes any type of travel along the section lines impractical if not impossible. (See map exhibit B.)

Life long residents of Campbell County have indicated that the road has been in continuous use since before 1913. (See Affidavits exhibits C and D.) The road was used for access to the Missouri River and to haul fire wood for the City of Herreid and surrounding areas. Prior to the Oahe project the road was also used for access to farmsteads along the Missouri.

The records of the Omaha District Corps of Engineers list the road as a public access road to the Oahe Reservoir. The map Exhibit B is a reproduction of the Corps of Engineers map made in 1947 which shows the road and terrain in question.

In 1962, at the request of some area landowners, the State Game and Fish Department attempted to close the road to the public. The Campbell County State's Attorney at the time determined that the road was public road, and the road remained open. Neither the Game and Fish Department nor the landowners pressed the issue; therefore, it was never litigated. (See Affidavit exhibit E.)

The Campbell County Highway Department periodically grades the road to keep it passable for vehicular traffic. With the acquiescence of the present landowners, the Campbell County Highway Department installed three cattle guards in the road on Sections 17 and 18.

In December, 1976, part of the NE 1/4 of Section 14 Township 127 N. Range 79 W. was platted as the Ralph Ritter Plat of Outlots. Since the platting there have been seven homes constructed on the outlots ranging in value from \$10,000.00 to \$35,000.00. There are at present plans to construct three more houses and a large boat house during the summer of 1979.

The only access to the outlots is the road in question, which during inclement weather, becomes impassable, isolating the area. Therefore, the homeowners made a request to the Board of County Commissioners to improve the road to provide all weather access.

The Board agreed to improve the road, and the County Highway Superintendent attempted to obtain easements from adjacent land-owners for back sloping and ditching. All the landowners except two, Esther Schuetzle (nee Rossow) who owns the E 1/2 of the E 1/2 of Section 18 and the W 1/2 of Section 17, and John F. Rossow who owns the E 1/2 of Section 17, granted the easements.

John F. Rossow attempted to close the road to prevent any access to the area. However, no legal action was taken and the public has continued unhampered use of the road.

The Board of County Commissioners is prepared to construct the road to the Oahe Reservoir and the Ralph Ritter Outlots. However, it is economically infeasible to open any section line in the area. Therefore, the Board requested that the State's Attorney seek a legal

determination of the status of the present road and advise them of the steps necessary to proceed with the road construction.

In amplification of the factual situation, you enclosed Exhibits A through E consisting of affidavits, a sketch, and a map. You have also further amplified the fact situation by verbal representations to the writer.

Based on the above factual situation, you have asked the following questions:

QUESTIONS:

1. Has the road been dedicated to the public by continuous use, work and repair?
2. If so, must any action, such as quiet title action, be taken before work is commenced?
3. If not, would the county be justified in condemning the land for public use, or must the county condemn under the Isolated Tract Statutes SDCL 31- 22?

The following does not apply to that portion of the described road along the section line between Sections 17 and 20, such portion being a highway by statute.

IN RE QUESTION NO. 1:

SDCL 31-3-1 provides:

Dedication to public by continuous use, work and repair of road. Whenever any road shall have been used, worked, and kept in repair as a public highway continuously for twenty years the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.

SDCL 31-3-2 provides:

Public highway not established by mere use. Notwithstanding § 31-3-1, the mere use by the public of any route of travel along or across public or private land, or the right-of-way of any railroad company for any period, shall not operate to establish a public highway and no right shall inure to the public or any person by such use thereof.

Historically, with minor changes of language by legislative enactments and action of the editor of the South Dakota Compiled Laws of 1967, what now appears as SDCL 31-3-1 was in force when the state was admitted into the Union (Rev. Political Code, 1877, c. 29, § 37; Compiled Laws, 1887, § 1227), and what now appears as SDCL 31-3-2 was first enacted in 1893 (Laws 1893, c. 100). The Legislature incorporated the provisions of both into the Revised Political Code of 1903 as one section (§ 1632). Both provisions continued to appear in a single section until again being separated by editorial action (SDCL 1967). The Supreme Court of South Dakota first had occasion to interpret the 1893 enactment in *Roche Realty and Investment Company v. Highlands Company*, 29 S.D. 169, 135 N.W. 684, (1912). The Court stated in that case:

It might have been contended with much force that the law of 1893 operated to repeal the former statute, but that question is not now material. The Legislature having incorporated the provisions of both statutes into the Revised Political Code of 1903 as one section, effect should be given if possible, to all the language of the entire section; the first sentence being so interpreted as to harmonize with the plain and unambiguous meaning of the remaining sections.

The Court, in that case, commented on the custom of "angling" across unoccupied lands, and that the evident purpose of the Legislature, in enacting the 1893 statute, was to prevent the establishment of public highways by operation of such custom.

To date our Court has followed the reasoning enunciated in the *Roche Realty* case and found no dedication in the following cases: *First Church of Christ, Scientist, v. Revell*, 68 S.D. 377, 2 N.W.2d 674 (1942); *Lacey v. Judge*, 68 S.D. 394, 2 N.W.2d 115 (1942); *Stannus v. Heiserman*, 72 S.D. 567, 38 N.W.2d 130 (1949); and *Brusseau v. McBride*, ____ S.D. ____, 245 N.W.2d 488. The Court has quoted, with approval, in the *First Church* and *Brusseau* cases, the following language from *Cole v. Minnesota Loan and Trust Company*, 17 N.D. 409, 117 N.W. 354, 17 Annot. Cases 304:

Ownership of land once had is not to be presumed to have been parted with; but the acts and declarations relied on to show a dedication should be unequivocal and decisive, manifesting a positive and unmistakable intention, on the part of the owner, to permanently abandon his property to the specific public use. If they are equivocal, or do not clearly and plainly indicate his intention to permanently abandon the property to the public, they are not sufficient to establish a dedication. The intention to dedicate must clearly appear,

though such intention may be shown by deed, by word, or acts. If by words, the words must be unequivocal, and without ambiguity. If by acts, they must be such acts as are inconsistent with any construction, except the assent to such a dedication.

In *Evans v. City of Brookings*, 41 S.D. 225, 170 N.W. 133 (1918), a case in which the court found that a dedication had in fact occurred, the court stated:

What amounts to a dedication by implication depends upon the facts of the particular case, and no hard and fast rule can be laid down as a guide for the courts.

The factual situation existing, as stated above, and as amplified by your verbal representations, discloses:

1. Substantial resistance, in 1962, by area landowners, to the particular route of travel being recognized as a "public road."
2. Unequivocal opposition by two affected landowners, at this time, to the public using the road.
3. No maintenance of the road by anyone, prior to 1973, and "periodic" maintenance by Campbell County since that date, consisting of one application of a "blade" each year, after the area dries up from spring run-off.
4. A type of usage at all times prior to the 1976 development along the river which could be described by the language of the Court in the *Brusseau* case as "light and sporadic."
5. A route of travel not of any particular established width or location, and which evidence may well show to have varied from year to year, and season to season, as dictated by ground conditions.

It is my opinion that the answer to your Question No. 1 is "No."

The language of the Court in the *Evans* case, and quoted with approval in the *Brusseau* case, combined with the fact the *Brusseau* case was a 3-2 decision, indicates that reasonable minds might differ as to a particular fact situation and that the final outcome of litigation could be affected by the make-up of the court deciding the issue.

IN RE QUESTION NO. 2:

The same is not applicable.

IN RE QUESTION NO. 3:

There is statutory authority for Boards of County Commissioners vacating and changing location of highways, SDCL 31-18 and SDCL 31-3. I see no legal impediment to the county acquiring right-of-way for a suitable road to serve the affected area by following procedures authorized by statute. Assuming that the county board, in its discretion, chooses to acquire such right-of-way, and statutory procedures are followed, the answer to your Question No. 3 is "Yes."

Respectfully submitted,

Mark V. Meierhenry
Attorney General

MVM:CBL:esp