

OFFICIAL OPINION NO. 85-40, Obstruction of section lines

October 7, 1985

Mr. Donald E. Covey  
Tripp County State's Attorney  
Post Office Box 1766  
Winner, South Dakota 57580

OFFICIAL OPINION NO. 85-40

Obstruction of section lines

Dear Mr. Covey:

You have requested an opinion from this office in regard to the following factual situation:

FACTS:

The Tripp County Commissioners have received complaints from several individuals about neighboring landowners who are farming unimproved section lines. These section lines are generally in areas where the roadway has not been improved or if the roadway was ever improved it has not been maintained. These section lines have never been vacated or closed pursuant to the appropriate statutory procedures.

In one instance, the farmer owning or operating the land on both sides of the section line has farmed straight through the section line thereby challenging any potential user to drive across his crops. This same farmer, if he owns or operates the land on only one side of the section line, will plow up the section line to the appropriate center, thereby forcing all travel onto the remaining thirty-three (33) feet.

In a separate case the operator farms the entire section line even though he owns or operates only the land on one side. This has forced the traveling public to drive upon the adjoining landowner's land since it is currently grassland.

Based on the above facts you have asked the following questions:

QUESTIONS:

1. May an adjoining landowner farm all or part of any unimproved section line without formal action to vacate and close the section line according to the statute?
2. If the answer to question one is in the negative, what is the remedy of the township? May the township require the offending landowner or operator to restore the section line to its pre-existing grassy state? If so, under what authority?

IN RE QUESTION NO. 1:

It has long been the law in South Dakota that 'there is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board or tribunal.' SDCL 31-18-1. This office, when dealing with a similar question in 1947, aptly stated: 'If none of these section lines have been vacated or relocated by proper action of the authorities, they are still highways open to traffic, the passage of which may not be in any manner obstructed. While they may not be in common use, in fact seldom used, they are nevertheless public highways.' 1947-48 AGR 140.

Whether or not a 'farming' operation constitutes an 'obstruction to travel' involves a factual determination. The Legislature has specifically forbidden construction of fences across highways, with the exception of those cases covered by SDCL 31-25, wherein provision is made for securing permission to fence under certain conditions, and in a certain manner. In SDCL 31-32-9 the Legislature has enumerated rocks, stones, and glass as obstructions which must be removed, and has also designated flooding by irrigation as a condition to be repaired. The state statutes have not defined 'farming' as an obstruction to a section line highway. It is the duty of the governing authority to determine whether or not a section line has been obstructed.

That factual determination, for the purpose of governmental action to remove an obstruction, is with the agency seeking such removal. Such agency is not the final authority, however, for in the event an aggrieved party chose to litigate the question, the ultimate decision would be with the court system. In a determination of what did or did not constitute an impermissible obstruction to travel, a distinction might be made on the basis of what manner of cultivation was used, and what type of crop was present. A logical distinction would be possible, for example, between a low-growing alfalfa crop and a head-high crop of corn or cane. Likewise, a logical distinction could be made between 'minimum till' and 'deep till' cultivation.

Any individual wishing to travel along a section line has an absolute right \_to do so even if it results in damage to growing crops.

IN RE QUESTION NO. 2:

Your question presupposes that the particular section line is the responsibility of a Township Board. Jurisdiction over the particular section line, as between the Board of County Commissioners and a Township Board, is determined by the following statutes. SDCL 31-12-19. 'The County Commissioners shall maintain properly and adequately all public highways within the county secondary system,' SDCL 31-1-5(3) and SDCL 31-13-1 provide that secondary highways in organized townships and not within the county system are to be administered by the Board of Township Supervisors. In the 'contentions and arguments' submitted with your questions, you have used the term 'township section lines' and based on such reference, I shall assume the section lines in question fall under the jurisdiction of the Township Board.

The Township Board bears the responsibility of providing the public with access to public highways and has the duty to keep them free of obstructions. SDCL 31-32-9. Any person who obstructs such section lines may be liable to the Township Board in a civil action brought pursuant to SDCL 31-32-8.

Aggrieved individuals may also have remedies, through civil proceedings, against the offending party in the form of an action for injunction or damages.

The governing body or board has the duty to cause the particular obstruction to travel to be removed. There is no specific statutory authority to compel restoration of a section line to its previous grassy state. It would, apparently, be within the power of the Board, in the exercise of its discretion, to find, as a matter of fact, that there was no other method of removing a particular obstruction but to restore the section line to its pre-existing grassy state. I express no opinion as to whether or not such a factual determination would withstand judicial scrutiny.

Respectfully submitted,

Mark V. Meierhenry  
Attorney General