

OFFICIAL OPINION NO. 87-42, Section line highways

December 29, 1987

Richard Beringson, Secretary
Department of Game, Fish and Parks
Anderson Building
445 E. Capitol Avenue
Pierre, South Dakota 57501

Official Opinion No. 87-42

Section line highways

Dear Mr. Beringson:

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

FACTS:

Various members of the public wish to hunt on section lines within the State of South Dakota. Such hunting is governed by SDCL 41-9-1.1. The South Dakota Supreme Court interpreted this statute in State v. Peters, 334 N.W.2d 217 (S.D. 1983), and stated that where a section line had been altered from its natural state of long grass prairie for the purpose of facilitating vehicular passage in that it contained compacted vehicle tracts and was likely cleared of rocks to avoid damages to vehicles that the section line had been improved, and was thus open to the public for hunting purposes. Questions continually arise regarding particular section lines, in whether the public may hunt on them or travel on them.

Concerning the preceding facts, you have asked the following questions:

QUESTIONS:

1. May the public hunt on section lines where crops have been planted over the section lines?

2. May the public drive on unimproved section lines, and if so, when does _the section line become sufficiently "improved" so as to permit hunting on it under SDCL 41-9-1.1?

3. May a landowner fence a section line, and if he does so, what remedies are available to those who either wish to travel on, or hunt on, the section line?

IN RE QUESTIONS:

For convenience, I will address all of your questions in one section of this opinion, without breaking the matter down further. Rights of the public in section lines are one of the more controversial and confusing issues arising in this State. Fortunately the matter has been fairly well delineated by statute and by the South Dakota Supreme Court in various cases.

The original basis for section line highways is the Highway Act of 1866, R.S. 2477, 43 U.S.C. § 932 (1970); repealed by P.L. 94-579, § 706(a), 90 Stat. 2744, 2793 (October 21, 1976). This Act provided a right-of-way for construction of highways over public lands, not reserved for public uses. The Legislature of Dakota Territory, and later the South Dakota Legislature, accepted this right-of-way grant by passage of SDCL 31-18-1 and 31-18-2. See Costain v. Turner Co., 72 S.D. 427, 36 N.W.2d 382 (1949). Thus, because of the federal grant, and the State's acceptance of that grant, there exists by _operation of law on every section line within this State a public highway, except where some portion of the highway along the section line has been vacated or relocated by lawful action of some authorized public officer, board, or tribunal. This public highway is present, and is open to vehicular traffic by the public, in any case where the section line has not been vacated. Thormodsgard v. Wayne Township Board of Supervisors, 310 N.W.2d 157 (S.D. 1981). Abandonment of such a section line highway cannot be established solely by evidence that the highway has never been opened, improved, or traveled. Id. at 159; Costain v. Turner Co., supra. Thus, it must affirmatively be shown that a section line highway has been vacated, or the section line remains open to public travel, whether or not the section line has ever been improved in any manner for vehicular travel. The fact that crops have been planted over section lines is irrelevant. So long as the section lines have not been legally vacated, the public has a right to travel them, whether or not they contain crops or other obstructions. Whether the public may hunt on section lines where crops have been planted is dependent upon whether the section line has been "improved" or is one "commonly used for vehicular travel."

Hunting on sections lines is permitted without consent of adjoining landowners (1) if the section line is "improved" for vehicular travel; or, where the section line is unimproved, if it is "commonly used by the public for _vehicular travel." This does not apply to controlled access facilities as defined in SDCL 31-8-1 and interstate highways. No one may hunt rights-of- way within six hundred sixty (660) feet of an occupied dwelling or church or school house or within like distance of livestock on adjoining land.

Perhaps the most difficult question is: When does a road become sufficiently "improved" to permit hunting under SDCL 41-9-1.1? First, no landowner may restrict access to a section line that has not been legally closed, and the public has a right to drive on it. Merely because the public has driven thereon, however, would be insufficient to render the section line "improved." In State v. Peters, 334 N.W.2d 217 (S.D. 1983) the South Dakota Supreme Court, in dealing with the definition of "improved," noted that rocks had probably been moved to facilitate vehicular travel and as such the road could be considered "improved." It is my opinion, based upon the Peters case, that in order for a section line to be considered "improved" it must be shown that something has been done to facilitate vehicular travel over the section line. If this is shown, the public would then have the right, not only to travel the section line, but also to hunt upon it.

Present usage of a section line would not be entirely determinative of the question of whether a section line has been improved. The presence of crops on a section line does not conclusively determine that it has never been altered for purposes of vehicular travel. Rather, it would be necessary to consider _the entire history of the section line, and to determine whether it has ever been altered for purposes of vehicular travel. Please note that merely because the section line has not been altered for purposes of vehicular travel, that fact alone does not give the landowner a right to exclude travel over the section line. Rather, unimproved section lines may be used for travel, but may not be hunted. They also may be fenced, but landowners are required to provide a gate and access to the unimproved section line. See SDCL 41-9-1.1; 31-25-1.1.

The other circumstance under which the public may hunt on a section line is where it is "commonly used as a public right-of-way." Regardless of whether or not it has ever been improved, a section line commonly used as a public right-of-way could be hunted by the general public.

A landowner adjoining a section line has no right to obstruct public travel on it, or to prevent persons from hunting it, where it is improved or commonly used as a public right-of-way. See SDCL 41-9-1.1, except as noted below.

A method is provided by SDCL 31-25-1 for the fencing of section line highways. This requires that landowners petition the county commissioners, whereupon, after notice to all adjacent landowners along the portion of the highway involved, the commissioners may, by resolution, authorize the landowners to erect and maintain fences across the section line highway. The board of county commissioners must, however, require erection of gates or _grates, or both, in such fences at points designated by the board so that the public may still have access to the highway. This section does not permit a landowner to keep the public from access to highways.

Further, under SDCL 31-25-1.1, a landowner may erect a fence across an unimproved county, township, or section line highway. Such a road is defined as one not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage. It is to be noted that this definition is the same as that contained in SDCL 41-9-1.1, which is discussed above. SDCL 31-25-1.1 further requires that at any point where a fence crosses a section line highway, the landowner must erect and maintain an unlocked gate which may be opened easily or provide other suitable access to the highway. The landowner is further required to make the gate or other access large enough, and make it open easily enough, to satisfy the needs of those using the highway. This must be done upon a request, filed with the sheriff of the county in which the land is located, by any adversely affected person. If a request is filed, the sheriff must notify the landowner. The landowner is then required within seven (7) days of the notice to erect a sufficiently large gate or other suitable access to the highway. Any landowner failing to do so is guilty of a Class 2 misdemeanor, and could be subject to criminal prosecution.

Public bodies, be they townships, counties or the State, have duty to _maintain public roads and rights-of-way. Members of the public can, therefore, petition the appropriate public body to maintain the highway, and to remove obstructions, and the public body has a duty to do so. I would encourage the latter method of obtaining access rather than any destruction even though it might not be malicious in nature.

It is not clear whether the public may remove obstruction to the section lines that it finds. In the case of K & E Land and Cattle Co., Inc. v. Mayer, 330 N.W.2d at 533 (S.D.

1983) the court held that even if a fence obstructed a public highway, one adjoining landowner did not have the right to destroy the fence. The case makes plain, however, that the landowner did have the right to travel the section line. It is my opinion that no member of the public can "maliciously" destroy a fence over a section line, even if it is wrongfully placed, however, a member of the public could travel the section line, and to the extent that such travel incidentally and unavoidably destroyed unlawfully placed obstructions, the landowner would have no right to recover for such destruction. See K & E Land and Cattle Co., Inc. v. Mayer, supra at 533. For instance, in my opinion, it would not be wrongful to cut a fence obstructing a public way if the fence could be reasonably restored, and it was not destroyed in the process provided there was no gate grate or other suitable access. Likewise, I do not believe it would be wrongful to remove hay bales placed in a public way or to drive over crops wrongfully planted in a section_line. So long as malicious destruction of property is avoided, and no more destruction is accomplished than is necessary to travel the public way, such damage or destruction to property would not be wrongful under Mayer.

Finally, the South Dakota Supreme Court has held that a private party can bring suit to enjoin another from obstructing section line highways with fences even where county commissioners have not acted properly by opening a road. Lawrence v. Ewert, 21 S.D. 580, 114 N.W. 709 (1908). Thus, the remedies would be three in number. Self help may be used where no malicious destruction takes place, and no more is done than is reasonably necessary to allow travel of the section line. The township board of supervisors, or board of county commissioners, can be petitioned, either in writing or orally in a regular meeting, to open and operate the highway as required by law. An aggrieved party can also bring an action in circuit court for an injunction or other appropriate relief to end obstruction of the section line highway.

Respectfully submitted,

Roger A. Tellinghuisen
Attorney General