

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-03

Date issued: January 6, 2000

Requested by: Robin Huseby, Barnes County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether an airplane licensed for aerial spray application is an implement of husbandry under N.D.C.C. § 39-01-01(26).

II.

Whether an airplane may use a county road for a landing strip.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that aircraft is not an implement of husbandry under N.D.C.C. § 39-01-01(26) even when used to aerially spray agricultural chemicals.

II.

It is my opinion that an airplane may not use a county road for a landing strip without prior consent from the board of county commissioners except in the event of an emergency landing.

- ANALYSES -

I.

An implement of husbandry means "every vehicle designed and adapted exclusively for agricultural, horticultural, or livestock raising operations or for lifting or carrying an implement of husbandry and in either case, not subject to registration if used upon the highway." N.D.C.C. § 39-01-01(26) (emphasis added). Under this definition, an airplane must be a "vehicle" to be considered an "implement of husbandry." The word "vehicle" includes "every device, in, upon, or by which any person or property may be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon stationary rails or tracks." N.D.C.C. § 39-01-19(89). A related definition is that of a farm tractor, which

"includes every motor vehicle designed and used primarily as a farm implement for drawing plows, moving machines, and other implements of husbandry." N.D.C.C. § 39-01-01(18). These definitions are generally limited to uses in Title 39 of the Century Code. 1997 N.D. Op. Att'y Gen. L-24, L-26 (Mar. 19 letter to McIntee). Cf. Ames v. Rose Township Bd. of Township Supervisors, 502 N.W.2d 845, 849 (N.D. 1993).¹

The North Dakota Supreme Court has held that "an aircraft is neither a 'motor vehicle' nor a 'vehicle'" as defined in N.D.C.C. § 39-01-01. RLI Ins. Co. v. Heling, 520 N.W.2d 849, 853 (N.D. 1994). For the same reason, it is my opinion that an aircraft is not an "implement of husbandry" as defined in N.D.C.C. § 39-01-01(26), even when used to aerially spray agricultural chemicals.

Statutes in Title 39 concerning implements of husbandry generally exempt such implements from some of the regulations which otherwise govern road vehicles. For example, implements of husbandry need not have a certificate of title. N.D.C.C. § 39-05-02.2(6). Under certain circumstances, implements of husbandry are exempt from maximum width, height, or length limitations of vehicles operated on a highway in North Dakota. N.D.C.C. § 39-12-04(1)(b) and (2)(b). Drivers of implements of husbandry are exempt from state laws requiring the use of safety belts. N.D.C.C. § 39-21-41.4. Under certain circumstances, a vehicle towing an implement of husbandry or an implement of husbandry towing a vehicle is exempt from requirements for a safety chain. N.D.C.C. § 39-21-44.2(2). Certain provisions regarding equipment on vehicles do not apply to implements of husbandry except where specifically made applicable. N.D.C.C. § 39-21-46(4). There are specific requirements concerning safety lamps and reflectors on farm equipment and implements of husbandry when operated on state highways during certain times. N.D.C.C. § 39-21-15. Finally, all implements of husbandry which are not designed for operation at speeds above 25 miles an hour must display either the triangular slow moving vehicle emblem or a rotating or flashing amber light whenever traveling along the roadway in the state of North Dakota. N.D.C.C. § 39-21-50.

Not one of the statutory uses of the term "implement of husbandry" would relate to an aircraft or an aerial spraying operation. These statutes are concerned with exempting or substituting different provisions for implements of husbandry when operated on the highways of the state than would otherwise apply to motor vehicles such as

¹ Certain provisions outside of Title 39 address implements of husbandry, but have no relevance to this inquiry. See N.D.C.C. §§ 19-20.2-01 and 19-20.2-07 (concerning anhydrous ammonia) and N.D.C.C. §§ 57-39.2-04 and 57-40.2-04 (concerning taxation).

automobiles or pickup trucks. There are no exceptions related to aircraft or which would provide that an aircraft used for an aerial spraying operation by virtue of being used in support of agriculture would be subject to different rules than the rules which are applicable to aircraft. Further, not one of the statutory uses of the term "implement of husbandry" would permit an aircraft to land or operate on a public roadway even if the aircraft met the implement of husbandry definition. Finally, none of the provisions in title 39 exempt "implements of husbandry" from the restrictions on excessive speed.

Therefore, it is my opinion that an aircraft is not an implement of husbandry under N.D.C.C. § 39-01-01(26), even where that aircraft is operating to aeriually spray agricultural chemicals in support of agriculture.

II.

Use of the public highways is not an absolute right of the public, but instead it is a right or privilege which a person enjoys subject to the control of the state in the valid exercise of its police power. Timm v. State, 110 N.W.2 359, 362 (N.D. 1961). State law governing aeronautics provides:

The landing of an aircraft on the lands or waters of another, without his consent, is unlawful except in the case of a forced landing.

N.D.C.C. § 2-03-04. At question is whether this law prohibits landing on highways and roads without approval of the appropriate government jurisdiction.

The Supreme Court "has previously held that highways belong to the state." Zueger v. Boehm, 164 N.W.2d 901, 904 (N.D. 1969); King v. Stark County, 266 N.W. 654, 656 (N.D. 1936) ("The highways belong to the state."). Further:

The state has control over its highways in its sovereign capacity, as represented by the legislature, and it may exercise its power directly or delegate it to any properly constituted body.

Zueger, 164 N.W.2d at 905. See also Chandler v. Hjelle, 126 N.W.2d 141, 147 (N.D. 1964).

The North Dakota Legislature has delegated its sovereign control over state highways to various political subdivisions. Cities have been delegated authority over streets, sidewalks, and public grounds.

N.D.C.C. § 40-05-01(8). The board of county commissioners for each county has been given the "sole authority and responsibility" concerning the county road system as designated and selected by the county board. N.D.C.C. § 24-05-17. Likewise, townships have authority to construct and maintain township roads. N.D.C.C. §§ 58-03-07(12) & (13), 58-12-03. Further, the state highway system is under control of the director of the Department of Transportation. N.D.C.C. § 24-01-03. Therefore, landing an aircraft on a road or highway requires permission of the appropriate governmental entity. For section lines which are open to travel but which are not included in any governmental road system, the permission of the landowners would be required. See 1966-68 N.D. Op. Att'y Gen. 93.

While the landing of aircraft on a public highway without the consent of the appropriate government agency or landowner is unlawful under N.D.C.C. § 2-03-04, that section does not provide a penalty for such an unlawful act. This office has previously observed that a civil action appears to be the appropriate remedy for violations of N.D.C.C. § 2-03-04. 1966-68 N.D. Op. Att'y Gen. 93.

It would be a question of fact whether an individual operating an aircraft and landing or taking off from a public highway would violate N.D.C.C. § 2-03-10(1), which provides:

Any person who operates any aircraft within the airspace over, above, and upon the lands and waters of this state, carelessly and heedlessly in willful disregard of the rights or safety of others, or without due caution and circumspection in a manner so as to endanger or be likely to endanger any person or property, is guilty of a class A misdemeanor.

However, relevant facts to consider include whether the aircraft occupied more than one lane of traffic, whether the aircraft occupied a lane of oncoming traffic, whether the aircraft exceeded the speed limit and the effect this may have if the aircraft was also in an oncoming lane of traffic, whether there were any hills or knolls which would obscure visibility, whether other roads or driveways intersect the portion of the road being used by the aircraft and whether the aircraft operator had obtained permission to block traffic on the highway and prevent people from lawfully using the highway while taking off or landing. An aerial spray operator was held civilly liable for an automobile accident and death where the aircraft was parked on a public road to be refilled with chemical spray and the automobile driver crested a knoll which obscured visibility and crashed into the aircraft. Haugen v. Mid-State Aviation, Inc., 144 N.W.2d 692 (N.D. 1966).

Although whether operating an airplane on a public road violates N.D.C.C. § 2-03-10(1) is generally a question of fact, some legal conclusions can be drawn from that section. First, the North Dakota Aeronautics Commission advises pilots to post individuals at each end of the road being used by the airplane to flag down oncoming traffic, in addition to obtaining permission from the appropriate governmental entity. In my opinion, failure to follow this advice and warn oncoming traffic from either direction that an airplane is being operated on the road is prima facie evidence of careless operation.

Second, permission to use a road does not excuse a pilot from complying with N.D.C.C. § 2-03-10(1). Appropriate safety measures still must be taken to avoid careless operation of an airplane, including the obligation to flag down oncoming traffic from both directions.

It may also be appropriate to enjoin an aircraft operator from using public roads as a landing strip if that activity is shown to be a public nuisance under N.D.C.C. ch. 42-02.

Based on the foregoing, it is my opinion that an airplane may not use a county road for a landing strip without prior consent from the county commission except in the event of an emergency landing.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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