FORMAL OPINION
2002-F-01

DATE ISSUED: January 4, 2002

REQUESTED BY: Mary K. O'Donnell
Rolette County State's Attorney

QUESTIONS PRESENTED

I.

Whether observation wells and water lines owned by the Turtle Mountain Band of Chippewa and located on the 33-foot section line easement constitute obstructions that must be removed to permit development and use of the section line as a public right-of-way, pursuant to N.D.C.C. §§ 24-07-03 and 24-06-28.

II.

Whether a board of township supervisors or a county commission has the duty to construct a road on or off a section line for the purpose of providing access to private property by the owner of that property.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that the observation wells and water lines located on the 33-foot section line easement and owned by the Turtle Mountain Band of Chippewa must be removed to permit development and use of the section line as a public right-of-way only if and to the extent they effectively deprive the public of the ability to travel on the section line.

II.

It is my further opinion that a board of township supervisors or a county commission has the duty to construct a road on or off a section line for the purpose of providing access

to private property by the owner of that property, if the property meets the requirements of N.D.C.C. § 24-07-06.

ANALYSES

I.

In North Dakota, congressional section lines located outside the limits of incorporated cities and outside properly recorded platted townsites, additions, or subdivisions are public roads and are open for public travel to the width of 33 feet on each side of the section lines. N.D.C.C. § 24-07-03. "No person may place or cause to be placed any permanent obstruction . . . within thirty-three feet . . . 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." N.D.C.C. § 24-06-28(1).

Your letter indicates the Turtle Mountain Band of Chippewa purchased a strip of land along the south edge of a section line and developed three water wells placed just south of the 33-foot section line easement. The observation wells are located on the 33-foot section line easement, as are the water lines. You indicate that this strip of land is not within the boundaries of the Turtle Mountain Indian Reservation, nor does it appear to be trust land, or land that is considered Indian country. Thus, the fact that the lands adjoining the section line are owned by the Turtle Mountain Band of Chippewa does not alter the analysis because this land is not subject to tribal jurisdiction. See 18 U.S.C. § 1151.

The extent to which the observation wells and water lines obstruct travel on the section line is relevant in determining whether they must be removed to permit development and use of the section line as a public right-of-way. Burleigh County Water Resource District v. Burleigh County of North Dakota v. Ternes, 510 N.W.2d 624 (N.D. 1994).

> A landowner abutting an open section line retains ownership of the property within the easement, subject to the public's right to travel. Small v. Burleigh County, 225 N.W.2d at 297. Compare Hjelle v. J.C. Snyder & Sons, 133 N.W.2d 625, 629 (N.D. 1965) (landowner retains ownership of property included in highway easement). The public's easement is limited to the right to travel, and does not include an absolute right to an object-free zone for the complete length and width of the section line. In Hjelle, we held that a highway right of way is not "obstructed" when a placement did not impede the public's right of passage. 133 N.W.2d at 630. We recently held that cattle guards or gateways do not have to be

> sixty-six feet wide to comply with NDCC 24-07-03, when approved by the board. Ames v. Rose Township Board of Township Supervisors, 502 N.W.2d 845, 850 (N.D. 1993). Only when an obstruction effectively deprives the public of the ability to travel on an open section line is their right to travel violated.

Id. at 628. Thus, it is my opinion the observation wells and water lines located on the 33-foot section line easement must be removed to permit development and use of the section line as a public right-of-way only if and to the extent they effectively deprive the public of the ability to travel on the section line.

II.

Three statutes address when the county or township may have a duty to construct a road to provide access to private property.

Two of those sections are N.D.C.C. §§ 24-06-11 and 24-07-03. Section 24-06-11, N.D.C.C., provides:

> Whenever a township constructs a ditch or drain in connection with road building, and such ditch, drain, or road interferes with the ingress or egress of any owner of adjoining land, the township shall install crossings at such point or points as will afford the owner or owners of the premises suitable ingress thereto or egress therefrom.

It is my understanding that the facts in this case do not involve the construction of a ditch or drain in connection with road building by a township; therefore, this section of the law is not applicable.

Under N.D.C.C. § 24-07-03, a board of county commissioners may close a section line or portion thereof if the section line is intersected by an interstate highway causing the section line to be a dead end, "providing the closing of the dead end section line does not deprive adjacent landowners access to the landowners' property." It is my understanding that the facts in this case do not involve the closing of a section line; therefore, this section of the law also is not applicable.

The only other statute imposing a duty on a county or township to construct a road to provide access to private property is N.D.C.C. § 24-07-06. That law provides:

> Whenever any tract of land is surveyed or sold in tracts less than the original subdivision as established by the government survey thereof, so

> that any part thereof does not touch upon a public road so as to allow the owner of such tract access to a public highway, the board of county commissioners or board of township supervisors, upon petition of such owner, may open a cartway or highway along the lines of any such tract or tracts when in the judgment of such board such cartway or highway is necessary, but no such cartway or highway may exceed two rods [10.06 meters] in width unless in the judgment of such board a roadway of such width is not sufficient to accommodate the travel thereon.

The North Dakota Supreme Court has determined that this section of the law requires a township board to provide a means of access to a tract of land which was surveyed or sold in tracts less than the original government subdivision if there is no other means of access. Hector v. Board of Township Supervisors of Stanley Township, 177 N.W.2d 547 (N.D. 1970). In the Hector case, the plaintiff was attempting to gain access to 40 acres of land he had purchased, to which he had no means of access. The Court stated:

> [U]nder the United States Public Lands Act, Title 43, United States Code Annotated, patents to public lands generally were issued for tracts of 160 acres. We therefore believe that this court may take judicial notice of the fact that the tract in question, being a forty-acre tract, is less than the original subdivision contained in the Government survey. The stipulated facts show that this forty-acre tract is bordered on the north, west, and south by lands belonging to others; that the Wild Rice River prevents access to this land from the east; and that there is no public highway which touches upon this particular tract. We therefore find that the statute providing for the establishment of a cartway to land sold in tracts less than the original subdivision set by the Government survey, which land does not touch a public road so as to allow the owner access thereto, is applicable to the tract in question. The plaintiff therefore is permitted to make application for a cartway under the provisions of this statute.
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> We find that the statute under consideration requires the granting of a cartway if there is no other means of access to a tract of land which was surveyed or sold in tracts less than the original subdivision as established by the Government survey. Where the board makes a determination on such issue, its determination of the facts presented may be appealed. On such appeal, as pointed out above, courts will follow the view that the determination of the board will not be overturned unless it is found to be

> arbitrary, capricious, or unreasonable. Application of Otter Tail Power Co., 169 N.W.2d 415 (N.D. 1969); Application of Northern States Power Co., 171 N.W.2d 751 (N.D. 1969).
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> . . . We concede that the township board has the power, in the exercise of its judgment, to approve, upon reasonable terms and conditions, or to deny the plaintiff's application for a cartway if there is some other possible means of access to the tract in question. However, such decision on the question of necessity may not be arbitrary, capricious, or unreasonable. If the rule were otherwise, the township board would be able to deny an application for a cartway where there was no other means of access merely because the board members did not like the applicant's politics or his religion or the color of his hair. Such determination clearly would be arbitrary, capricious, and unreasonable.

Hector at 550-551. Thus, it is my conclusion that whether the county or the township is required to provide access to private property in this case depends upon whether the factual requirements of N.D.C.C. § 24-07-06 are met.

It is my further opinion that if N.D.C.C. § 24-07-06 does apply, the duty to provide the means of access will fall upon whichever entity (i.e., the county commission or the township board of supervisors) has jurisdiction under N.D.C.C. § 24-07-05 (generally, the township board of supervisors in organized townships and the county commissoin in unorganized townships).

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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Attorney General

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