

**LETTER OPINION  
2003-L-34**

August 18, 2003

Mr. Scott Stewart  
Cavalier County State's Attorney  
PO Box 151  
Langdon, ND 58249-0151

Dear Mr. Stewart:

Thank you for your letter asking about the abandonment of parts of a state highway and the sale of the right of way.<sup>1</sup> You ask whether the Department of Transportation (Department) violated the abandonment statute by failing to file an abandonment order with the affected counties prior to the sale of abandoned right of way. You also ask whether the purchaser of abandoned right of way may close it to traffic.

Abandonment of parts of the state highway system right of way is provided for by N.D.C.C. § 24-01-06. That section states:

The director has the authority to abandon sections of routes on the state highway system when such abandoned sections are substantially replaced by improvements on new locations serving the area. Such abandonment may be made even though such highway is not placed on any other road system.

The abandonment order must be filed with the office of the recorder of each county in which the abandonment occurs.

A section of highway is abandoned when it ceases being used as a right of way with no intent to reclaim or use it again for highway purposes. N.D.C.C. § 24-01-01.1(1). The "state highway system" is "the system of state principal roads designated by the director of the department, the responsibility for which is lodged in the department." N.D.C.C. § 24-01-01.1(45).

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<sup>1</sup> "Right of way" is "a general term denoting land, property, or interest therein, acquired for or devoted to highway purposes." N.D.C.C. § 24-01-01.1(38).

As you noted in your letter, a portion of North Dakota Highway 5 was rerouted in 1972. According to information provided to my office by the Department, that part of the highway was taken out of the state highway system and replaced because of safety concerns as it had a curve and was viewed as a potential slide area. There was no intent by the Department to reclaim or again use the segment that had been taken out as part of the state highway system.

When part of a state highway system route is abandoned, the local governing board having jurisdiction over the area in which the road lies is not required to put the abandoned section of roadway on its highway system or to maintain the abandoned section of roadway, but it may choose to include that section in its road system. N.D.A.G. 81-09. The part of the highway that was removed was never placed on any other road system and was gratuitously and minimally maintained by the Department until it was sold in 2002.

Despite minimal maintenance by the state, it would appear that this portion of the roadway was indeed abandoned within the meaning of N.D.C.C. §24-01-06 in that beginning in 1972, the section of road in question permanently ceased to be used as a portion of North Dakota Highway 5 which is part of the state highway system. See N.D.C.C. § 24-01-01.1(1) and (45). Furthermore, the abandoned section was replaced by a new location serving the area in 1972.

Even though, as you noted, no abandonment order was ever recorded in the affected counties, that fact is not material here since the provision in N.D.C.C. § 24-01-06 requiring filing of an abandonment order did not become a part of that law until 1987, some 15 years after the portion of Highway 5 was abandoned. See 1987 N.D. Sess. Laws ch. 312, § 1. Moreover, nothing in N.D.C.C. § 24-01-06 deals with the sale of state highway right of way abandoned under that statute.

Consequently, in response to your first question, it is my opinion that the Department did not violate N.D.C.C. §24-01-06 by failing to file an abandonment order in the affected counties prior to the sale of the property since filing was not required when the property was abandoned from the state highway system in 1972 and since N.D.C.C. § 24-01-06 does not relate to the sale of state highway property.

It should be noted that N.D.C.C. § 24-01-28 does authorize the sale of certain state highway rights of way under the conditions stated therein. Under N.D.C.C. § 24-01-28 the state may sell and convey its interest in property acquired by purchase if the property is no longer necessary for highway purposes.

The answer to your second question about whether the purchaser of abandoned right of way may close it to traffic depends on whether the public has acquired a prescriptive or

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other right to use the abandoned roadway either before the road was built or after it was abandoned. If a roadway has been established by prescription (N.D.C.C. § 24-07-01), the public's right to travel on it arguably may remain. Fears v. Y.J. Land Corp., 539 N.W.2d 306, 308 (N.D. 1995); Casey v. Corwin, 71 N.W.2d 553, 556 (N.D. 1955). Whether a prescriptive right under N.D.C.C. § 24-07-01<sup>2</sup> exists requires the finding of numerous facts which is beyond the scope of an Attorney General's opinion. N.D.A.G. 2000-F-17; see also Hartlieb v. Sawyer Twp. Bd., 366 N.W.2d 486, 488 (N.D. 1985).

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/vkk

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<sup>2</sup> N.D.C.C. § 24-07-01 provides "[a]ll public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not."