

LETTER OPINION
96-L-239

December 19, 1996

Ms. Cynthia Feland
Grant County State's Attorney
PO Box 104
Carson, ND 58529

Dear Ms. Feland:

Thank you for your letter asking two questions concerning the construction of fences or gates within the 66-foot easement that runs along a section line. See N.D.C.C. § 24-07-03.

You first ask whether a board of county commissioners may approve fencing across a section line which has not been closed, when the fence includes a gate but does not include a cattle guard. Your second question is whether a board of county commissioners may grant permission for the construction of a fence parallel to a section line so long as it does not effectively close what is otherwise an open section line.

N.D.C.C. § 24-06-28 provides:

1. No person may place or cause to be placed any permanent obstruction, stones, trees, or rubbish within thirty-three feet [10.06 meters] 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. The permission must be granted where the section line has been closed pursuant to section 24-07-03 or where the topography of the land along the section line is such that in the opinion of the board of county commissioners or board of township supervisors, as the case may be, the construction of a road on the section line is impracticable.
2. Subsection 1 may not be construed to prohibit construction of fences:

- a. Along or across section lines which have been closed pursuant to section 24-07-03 or which have not been opened because construction of a road is impracticable due to the topography of the land along the section line, but such fences are subject to removal as provided in section 24-06-30.
 - b. Across section lines which have not been closed pursuant to section 24-07-03 if cattle guards are provided in accordance with chapter 24-10 where fences cross the section lines.
3. The construction of fences pursuant to subsection 2 may not be considered an obstruction of section lines and any person who damages any fence or who opens and fails to close any gate constructed under subsection 2 is guilty of an infraction.

A prior version of this statute was held not to apply to section lines which are incorporated into interstate, state, county, and township roads. Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1976). Therefore, N.D.C.C. § 24-06-28 only applies to unimproved section lines which are open for travel under N.D.C.C. § 24-07-06.

Thus, fences may be constructed across section lines "if cattle guards are provided in accordance with chapter 24-10 where fences cross the section lines." N.D.C.C. § 24-06-28(2)(b). N.D.C.C. ch. 24-10 requires approval by the board of county commissioners or the board of township supervisors for construction of cattle guards and gateways, and further requires that "[n]o cattle guard may be erected upon any highway or section line unless there also is provided adjacent thereto an ample gateway in which must be erected a gate which may be opened easily and closed by the public." N.D.C.C. § 24-10-02.

In 1976, the North Dakota Supreme Court considered previous versions of N.D.C.C. § 24-06-28 and N.D.C.C. ch. 24-10 in determining whether it was lawful to have a gate across a section line. Saetz, 240 N.W.2d at 69, 72. The court interpreted N.D.C.C. § 24-06-28 and its reference to chapter 24-10 in light of the public trust imposed upon North Dakota through its acceptance of the grant of section line easements from the federal government. The court stated:

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[W]e conclude that the Legislature did not intend to violate its trust by tolerating fencing in any form which would effectively deprive the public of its right to free passage over section lines. . . .

We conclude that the balancing of the rights can only be validly accomplished, without a violation of the trust, by interpreting § 24-06-28 as requiring cattle guards and gateways at every point where a fence line intersects a section line, pursuant to the provisions of Chapter 24-10, NDCC. This permits free movement of vehicles over cattle guards and permits the bypass of the cattle guard for livestock movement through an adjacent gateway, which shall include a gate.

Saetz, 240 N.W.2d at 72 (emphasis in original) See also, Ames v. Rose Tp. Bd. of Tp. Supervisors, 502 N.W.2d 845, 848 (N.D. 1993). Both N.D.C.C. § 24-06-28 and N.D.C.C. ch. 24-10 have been amended since the Saetz opinion was issued. See 1977 N.D. Sess. Laws ch. 234, 1993 N.D. Sess. Laws ch. 277, 1995 N.D. Sess. Laws ch. 263. The amendments, however, do not change the conclusions in the Saetz opinion. Saetz requires that a cattle guard over which vehicles may travel unimpeded be placed together with an adjacent gate through which cattle, or farming implements too wide for the cattle guard, may pass. See also Ames, 502 N.W.2d at 848-50.

Although N.D.C.C. § 24-06-28(1) permits the board to approve permanent obstructions, the public trust doctrine as outlined in Saetz does not permit installation of a gate without a cattle guard to be approved as a permanent obstruction under that section. The statute in effect at the time of the Saetz opinion provided the board authority "to determine whether the situation is better served by the installation of a gateway or a cattle guard." 240 N.W.2d at 72 (emphasis in original). If, as the court's opinion held, the public trust doctrine requires both a gate and a cattle guard where a statute provided specific discretion for the board to approve either a gate or a cattle guard alone, then it is my opinion that the public trust doctrine as interpreted in Saetz also prohibits a board from approving a gate without an adjacent cattle guard under N.D.C.C. § 24-06-28(1).

However, fencing along section lines within the 66-foot easement does not necessarily deprive the public of its right to free passage over section lines. N.D.C.C. § 24-06-28(1), quoted above, states that no person may place any permanent obstruction within 33 feet of any section line unless written permission is first secured from the

board of county commissioners or board of township supervisors. Subsection 1 further provides: "the permission must be granted where the section line has been closed pursuant to section 24-07-03 or where the topography of the land along the section line is such that in the opinion of the board of county commissioners or board of township supervisors, as the case may be, the construction of a road on the section line is impracticable." N.D.C.C. § 24-06-28(2) provides, in part:

Subsection 1 may not be construed to prohibit construction of fences:

- a. Along or across section lines which have been closed pursuant to section 24-07-03 or which have not been opened because construction of a road is impracticable due to the topography of the land along the section line, but such fences are subject to removal as provided in section 24-06-30.

Thus, a board of county commissioners or board of township supervisors must grant permission to construct a fence within 33 feet of either side of a section line if the section line has been closed or the section line has not been opened due to the topography of the land.

In other situations, a board of county commissioners or board of township supervisors may grant permission for an obstruction, but may not "indiscriminately approve all permanent obstructions." Burleigh County Water Resource District v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994). "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. Vehicles, livestock, and implements of husbandry should be able to travel on the section line. Saetz, 240 N.W.2d at 72, Ames, 502 N.W.2d at 848-50. If either board does authorize a permanent obstruction within 33 feet of either side of a section line, the board should make clear that the obstruction may have to be removed at some point in the future at the expense of the landowner who obtained permission for the obstruction.

Therefore, it is my opinion that a board of county commissioners or board of township supervisors may grant permission for construction of a fence parallel to an open section line so long as the fence does not effectively deprive the public of the ability to travel on the section line.

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Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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