

LETTER OPINION
95-L-121

May 19, 1995

Ms. Ann Mahoney
Assistant State's Attorney
Oliver County Courthouse
Center, ND 58530

Dear Ms. Mahoney:

Thank you for your letter concerning a section line closure action by the Oliver County Commission dating back to July 6, 1972. Your questions concern a "road spur which meandered off the [closed] section line" and which was apparently the linkage between the section line and a state highway. You indicate that no public easement was ever granted to the county and that if the road spur was a county road, it would have been a road acquired by prescriptive use. You also indicate that there is some dispute regarding the extent of the access allowed on the road spur after the county section line closure proceeding.

You asked the following questions:

1. Does the closure of a county road effectively abandon any public easement over and across the land not within the 66' section line easement area, where that portion of the road is not used by the general public thereafter, although some permissive use is allowed by the landowners to allow other landowners access to their land?
2. Did the county action to "close" this road extinguish any road easement established by prescriptive use such that the road and any right of way reverted to the adjoining landowner?
3. If the county action to close the county road, as it related to the section line, was improper, invalid or illegal, would that illegality or invalidity extend to the closing of the road spur meandering off the section line?

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The answer to all three of your questions depends upon whether the road spur at issue was in fact a road acquired by prescriptive use and if so, whether the section line closure proceeding acted to extinguish the prescription.

The basic elements for establishing a road by prescription are:

1. General, continuous, uninterrupted, and adverse use of the road;
2. By the public under a claim of right; and
3. For a period of twenty years.

Hartlieb v. Sawyer Township Board, 366 N.W.2d 486, 488 (N.D. 1985). Establishing the elements of a road by prescription are questions of fact. See, e.g., id.; Mohr v. Tescher, 313 N.W.2d 737 (N.D. 1981); Backhaus v. Renschler, 304 N.W.2d 87 (N.D. 1981); Keidel v. Rask, 290 N.W.2d 255 (N.D. 1980); Berger v. Berger, 88 N.W.2d 98 (N.D. 1958).

The Office of Attorney General is limited to dealing with questions of law and is not authorized to resolve factual disputes of any nature; however, the following analysis may be of some assistance to you.

The threshold question in resolving the issues you raise is whether the section line closure action also acted to close or vacate or extinguish the road spur, assuming the road spur is determined to be a road acquired by prescription. N.D.C.C. ? 24-07-03 provides that the board of county commissioners is authorized to close section line roads if certain conditions are met. N.D.C.C. ? 24-07-04 gives counties and townships general jurisdiction over proceedings to open or vacate highways. N.D.C.C. ? 24-07-05 provides that "[t]he board having jurisdiction as provided in this chapter may alter or discontinue any road or lay out any new road upon the petition of not less than six qualified electors who have an ownership interest in real estate in the vicinity of the road to be altered, discontinued or laid out."

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Thus, chapter 24-07 provides authority to the counties and townships to close or vacate roads that are not within the limits of incorporated cities or under the exclusive control of the Department of Transportation. See N.D.C.C. chs. 24-01, 24-02, 40-39; Casey v. Corwin, 71 N.W.2d 553, 555 (N.D. 1955).

It is my opinion that a closure of a section line road under N.D.C.C. ? 24-07-03 is limited to the congressional section line and the 66-foot width prescribed by statute. A county or township road acquired by prescription can only be closed, vacated or extinguished in one of two ways: (1) by utilizing the process outlined in N.D.C.C. ? 24-07-05 et seq.; or (2) by nonuse of the road by the public for the period prescribed for establishing a road by prescription (20 years). See Casey, 71 N.W.2d at 556. It is my opinion that the validity of the section line closure proceeding is immaterial to the question of whether the road by prescription (if shown to be such) has been extinguished.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

pcs/pg

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