

N.D.A.G. Letter to Renner (May 7, 1990)

May 7, 1990

Mr. Jerry Renner
State's Attorney
Kidder County Courthouse
P.O. Box 229
Steele, ND 58482

Dear Mr. Renner:

Thank you for your April 4, 1990, letter inquiring whether a gate or a cattle pass is required in a fence line crossing a section line to provide access to and permit travel upon the section line right-of-way.

A question, very similar to the one you asked, has been considered by the North Dakota Supreme Court. In Saetz v. Heiser, 240 N.W.2d 67 (N.D. 1976), the court concluded that both a cattleguard and a gate would be required in a fence line crossing a section line. The court held:

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 the 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. This construction eliminates the ambiguity created by the phrase in § 24-06-28 relating to the penalty for failing to close gates. Gates are accordingly authorized within thirty-three feet of a section line but only in a gateway adjacent to a cattle guard.

Id. at 72 (emphasis in original).

I would deem the Saetz decision to be applicable and controlling on the question of whether a gate or a cattleguard is required.

As to your question of whether the township or the county have jurisdiction, the answer to that question is resolved by applying N.D.C.C. §§ 24-10-01 and 24-10-02.

In Small v. Burleigh County, the North Dakota Supreme Court stated permission for a cattleguard or gate must be obtained "from either the board of county commissioners or the board of township supervisors, as the case may be," 239 N.W.2d 823, 828 (N.D. 1976) (emphasis supplied). The determination of which board is to authorize the placement of a gate or cattleguard is one of fact. Thus, I cannot answer this question.

I trust the information I have provided will be of assistance to you.

Sincerely,

Nicholas J. Spaeth

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