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MPC REPORT NO. 97-69

Legal Implications to Closing or Reducing Maintenance on Low Volume Roads in North Dakota

Peter D. Welte
Jill A. Hough
Ayman G. Smadi

March 1997

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Peter D. Welte,
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Ayman G. Smadi

Upper Great Plains Transportation Institute
North Dakota State University
P.O. Box 5074
Fargo, North Dakota 58105
(701)231-7767

March 1997

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Disclaimer

The contents of this report reflect the views of the authors, who are responsible for the facts and the accuracy of the information presented. This report is intended as a guide for North Dakota counties and townships, and is intended for their use in minimizing tort liability associated with closing, abandoning, or assigning minimum maintenance designation to low volume rural roads. This report is not, in any way, shape, matter or form intended to be a legal opinion. A legal opinion is beyond the scope of this report. Such opinions only can be issued by a licensed attorney, and such opinions vary depending upon the specific facts of different situations. To obtain a legal opinion, county and township officials must contact a licensed attorney.

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Peter D. Welte, Jill Hough, and Ayman Smadi

ABSTRACT

North Dakota has more than 102,000 miles of rural roads. Approximately half of these roads are paved and the rest are gravel or dirt. Counties or townships usually are responsible for the maintenance of most gravel roads. Due to limitations in funding and shifts in traffic patterns, counties and townships are forced to make difficult decisions regarding the maintenance of their roads. Some roads have higher levels of traffic and thereby justify higher levels of maintenance, whereas some roads with minimum to levels of traffic may justify reductions in maintenance and possibly closure.

Legal questions arise when counties and townships consider changing the maintenance levels and possibly closing some of their roads. Road safety is a goal all counties and townships strive to achieve. However, reducing maintenance levels or closing a road may pose some safety concerns, especially in the form of accidents involving motorists who are unaware of road conditions. As a result, tort actions for property damage, personal injury or wrongful death may be filed against counties or townships. By statute, the liability of counties and townships in North Dakota is limited to $250,000 per person and $500,000 per occurrence.[1] This figure does not include legal fees, attorneys fees, investigative fees, fees for expert witnesses, nor the loss of productivity from the time spent on legal issues instead of normal day-to-day activities. Indeed, the out-of-pocket costs associated with a single lawsuit easily can approach $500,000 or more, even if the final ruling is in favor of the county or township.

However, by following appropriate legal procedures, counties and townships can minimize tort liability and curb the number of potential lawsuits. The North Dakota Century Code clearly delineates the process/procedure to follow when considering reduced maintenance or road closure. This project discusses some of the legal implications and outlines possible approaches to assist counties and townships in North Dakota to minimize their tort liability with respect to closing roads, abandoning roads, or designating minimum maintenance roads. This information is intended to be a guide, and is not

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[1] See N.D.C.C. section 32-12.1-03 (1995).

a legal opinion. For detailed questions about closing, abandoning, or designating minimum maintenance roads, counties or townships should consult with a licensed attorney.

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CHAPTER 1

INTRODUCTION

North Dakota has more roads per capita than any other state in the nation (NDDOT 1994). Maintaining the extensive road network is challenging for government agencies at the state, county, and local level. Out-migration of North Dakota's young residents to urban centers raises concerns for reduced tax-base. A decline in the tax base will further limit funds for maintaining the road network. In addition the potential changes in federal transportation policy could hinder recipient states (states that receive more federal dollars than what they pay in) as a decline in revenue would be difficult to recapture. Currently, North Dakota receives approximately $1.80 for each $1 it contributes to the federal gasoline tax. Donor states — states which contribute more than what they receive in federal dollars — are lobbying to change the funding formula so they would receive more of what they paid in. A loss of federal revenue in states, such as North Dakota, relying heavily on federal transportation dollars would increase the difficulties of sustaining the current maintenance levels on roads.

Furthermore, travel patterns are changing on many of the roads throughout the state. Changes in the agricultural industry and increased commuter traffic are redistributing traffic in several counties. Adjustments in road maintenance are necessary to accommodate the shifts in traffic patterns. The large number of miles of road, budget limitations, and changes in traffic patterns create unique opportunities and challenges for road officials and decision makers. Each of these obstacles contributes to the need for counties in North Dakota to prioritize their road system and, in turn, the maintenance level on their roads. Road prioritization is becoming more of a reality for all levels of government. Governor Schafer, in his 1997 State of the State Address said he would like the Department of Transportation to work directly with cities and counties to analyze the statewide transportation system, road by road. Over the next few years, it can be expected that more attention will be diverted to prioritizing the road system.

A possible approach local government might take to reduce the road system could be to reduce maintenance and declare a road as "minimum maintenance." Another option counties may consider is closing roads with very low traffic flows. Roads that currently are held open only to provide access to farmsteads could be closed if the farmstead has alternative access routes. By closing some of the roads, thousands of dollars a year could be saved due to reduced maintenance costs, while reasonable access to farmsteads is not denied.

There are legal implications to reducing maintenance or closing roads, which could limit government agencies' ability to make these decisions or result in tort liability issues later on. However, the North Dakota Century Code outlines proper procedures that can be followed by counties to prevent tort liability cses as a result of closing roads. Over the last eight years, there have been about 20 tort lawsuits filed against North Dakota counties and townships for road-related accidents. The lawsuits ranged from accidents due to washouts on roads to accidents occurring on abandoned roads. One accident that occurred on an abandoned road resulted in an $231,000 claim. Claims this large can place a heavy burden on counties with limited road budgets.

OBJECTIVES OF STUDY

The objective of this report is to provide an overview of relevant North Dakota laws and provide a tool to guide counties and townships when making road closure decisions. The scope of the report is limited to low-volume rural roads in North Dakota, and does not include state highways or rural roads with bridges located on the section to be closed or declared minimum maintenance.[2] This report also offers suggestions for legal clarification by the North Dakota State Attorney General's office and by the North Dakota Legislature.

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[2] For situations involving county liability for bridges, see N.D.C.C. sections 24-08-01 and 24-08-03. These are situations where immediate consultation of an attorney is necessary.

Description of the Study

This report examines and summarizes relevant sections of the North Dakota State Code regarding closing, abandoning, or assigning minimum maintenance designation to low-volume, rural roads in North Dakota. Both statutory law and case law were studied, and different options were evaluated. In addition, tort cases and laws in other states were examined for further insights. A simplified approach was developed and outlined to assist counties in reducing liability risk when declaring a minimum maintenance road or closing a road. These procedures are outlined in this report.

General Legal Principles

Minimizing tort liability requires a basic understanding of certain legal principles. Generally, the law is "made" in one of two ways: (1) through statutes, which are developed through the legislative process, and; (2) through case law, made from the published results of individually adjudicated cases. In North Dakota, individual statutes are published in the *North Dakota Century Code* (N.D.C.C.). North Dakota cases are generally published in the *Northwest Reporter* (N.W.2d).[3]

Although both the legislature and the courts "make" law, only the courts interpret law. In doing so, courts give great deference to precedent and are usually consistent with precedent in issuing decisions on particular cases. This precedent provides notice to counties and townships regarding how the courts interpret particular laws. Therefore, it is to a county's and a township's benefit to be familiar with both statutory and case precedent. In turn, they will be better able to reduce their tort liability and, therefore, their risk of potential lawsuits.

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3 Federal (as opposed to State) cases are published in different reporters, abbreviated F.Supp., F.2d, or F.3d, for example. For the purposes of this report, the most applicable reporter is the Northwest Reporter.

The Role of the Law in Surrounding States

In preparing this report, the law in North Dakota was analyzed in comparison to other states, specifically Colorado, Wyoming, Utah, Montana, South Dakota, and Minnesota. Generally, the basic principles in this report apply to these states. For example, these states generally have statutory procedures that detail the proper steps to take in closing, abandoning, or assigning "minimum maintenance" designation to roads. Furthermore, both sovereign and governmental immunity have generally been abolished in these states. Most of these states also have some sort of Tort Claims Act, an act defining many tort liability concepts, including functions that qualify as "discretionary functions," an important concept in discussing county and township tort liability. A discretionary function is one for which governmental/sovereign immunity still exists, as long as the governmental unit has not been negligent. Loosely defined, it is a function for which, absent negligence, governmental units cannot be sued in tort, even though the general concept of governmental/sovereign immunity has been abolished.

There are cases in each of these six states interpreting both discretionary functions and the proper procedures for road closure decisions. Since the facts in each case vary, a summary of the law in each of these states is beyond the scope of this report. However, this report does contain a list of primary cases in each of the six states and the legal citation to these primary cases. These cases provide a strong foundation for building a legal analysis, depending on which facts the analysis is premised.

REPORT ORGANIZATION

The remainder of this report is divided into three parts. Legal terms and issues are addressed in Chapter 2. Road alternatives and legal implications are presented in Chapter 3. The summary, conclusions, and recommendations are presented in Chapter 4. Appendix A contains the relevant rural road North Dakota Century Code, which was closely examined for the contents of this report. Appendix B contains the legal citations for the relevant rural road laws in neighboring states.

CHAPTER 2

LEGAL TERMS AND ISSUES

This chapter discusses some of the key legal concepts e.g. immunity, discretionary functions, negligence, that are helpful in understanding the subject matter of this report. This chapter is a general introduction to the concepts contained in this report, and also is useful as a reference when reading the materials contained in Chapters 3 and 4.

Sovereign vs. Governmental Immunity in North Dakota

In North Dakota, there is an important distinction between "governmental" and "sovereign" immunity. Sovereign immunity refers to the immunity of the state. Governmental immunity, on the other hand, refers to the immunity of political subdivisions, but not the state itself.

In 1974, the North Dakota Supreme Court abolished the doctrine of governmental immunity in the State of North Dakota.[4] Twenty years later, the North Dakota Supreme Court abolished the doctrine of sovereign immunity in North Dakota.[5] However, in certain instances (e.g., discretionary functions) sovereign and governmental units retain their immunity, and are therefore free from liability in tort. For example, a county's decision to place a sign on a road may, under the proper circumstances, be a discretionary function. In that case, the county would be immune from any lawsuits that were based upon the county's non-negligent decision to sign the road. The next section of this report has a more detailed discussion of discretionary functions.

This report is concerned mainly with the tort liability of governmental units rather than the tort liability of the sovereign.

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[4] *Kitto v. Minot Park Dist.*, 224 N.W.2d 795, 800 (N.D. 1974).

[5] *Bulman v. Hulstrand Constr. Co.*, 521 N.W.2d 632 (N.D. 1994).

Discretionary Functions

In 1974, the North Dakota Supreme Court held that governmental immunity would be retained for "certain acts that go to the essence of governing." The court stated, "[w]e hold that no tort action will lie against governmental units for those acts which may be deemed *discretionary* in character." This passage refers to what is commonly known as *the discretionary function exception.* Unfortunately, at the time of the ruling, no test was created for future courts to use in determining which acts were "discretionary functions," and which acts were not.

In October, 1995, the North Dakota Supreme Court finally provided clear and explicit analysis regarding the discretionary function exception to tort liability in North Dakota.[6] To understand that analysis, it is important to examine section 32-12.1-03 of the North Dakota Century Code.

Section 32-12.1-03 is reprinted in the Appendix of this report. For discretionary function purposes, the relevant part of the statute is the third subsection. It reads, in relevant part:

> 3. A political subdivision is not liable for . . . the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused.

The language of section 32-12.1-03(3) comes directly from the language used in the Federal Tort Claims Act. Section 32-12.1-03(3) was the crucial code section underlying the rationale of the North Dakota Supreme Court in *Olson v. Garrison*, the 1995 case that set forth the test for determining discretionary functions in North Dakota.

Discretionary Function Test

The North Dakota Supreme Court noted that they had not yet adopted a test for determining which acts were discretionary functions. The court also noted that two other discretionary function tests had been either rejected or not accepted in North Dakota. First, the court pointed out that the

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[6] *Olson v. Garrison*, 539 N.W.2d 663, 667 (N.D. 1995).

"governmental/proprietary" distinction had been rejected as a means of determining which governmental acts are discretionary. Second, the court also recognized that the "planning/operational" distinction had not been accepted as a means of determining discretionary acts.

However, the court noted that the "North Dakota Legislature adopted essentially in whole" the language of the Federal Tort Claims Act. They emphasized that "the purpose of the exception is to prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy . . ."

The court then explained the two-part test. The first question is "whether the action is a matter of choice for the acting employee." If the answer to the first question is "yes," then the second question is "whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield." A positive answer to both prongs of the test results in no tort liability for the governmental entity.

Question 1: Is the Action a Matter of Choice for the Acting Employee?

The discretionary function exception does not apply to acts where a statute, regulation, or policy specifically prescribes a course of action for the actor to follow. For example, a specific and mandatory directive with regard to closing rural roads might be a statute that reads "a road must be closed if the road authority knows of a washout at any place on the road." Such a statute probably qualifies as a specific and mandatory directive. If the statute had read "roads with washouts may be closed as the road authority sees fit," this is not a specific and mandatory statute, so the discretionary function may be applicable.

Question 2: Is the Judgment or Choice Involved the Kind that the Discretionary Function Exception was Designed to Shield?

With regard to the second prong of the discretionary function test, the focus of this inquiry is on the nature of the actions taken and whether they are subject to policy analysis. The second inquiry asks whether the governmental conduct in question is the kind of conduct that the discretionary function is intended to protect.

In answering the second inquiry, it is crucial to understand the underlying rationale of the discretionary function exception. The idea behind the discretionary function is preventing "judicial second guessing" of legislative and administrative decisions grounded in policy. If properly applied, the discretionary function exception shields only governmental action based on public policy considerations. The public policy considerations may be social, economic, or political. Economic considerations alone, however, are not enough. Other factors, such as historical maintenance of roads, costs to repair in comparison with cost to close or abandon a road, disruption to road activity, and alternative routes available to travelers are all examples of other pertinent factors that courts may look at in determining if the discretionary function exception applies to a road closure or minimum maintenance road decision.

Discretionary Functions and North Dakota

The North Dakota Supreme Court explicitly looked to the federal courts for discretionary function analysis. Therefore, the federal courts should be a useful model for predicting how North Dakota courts will analyze governmental tort liability questions regarding the discretionary function exception.

Although the law is impossible to predict with complete accuracy, it appears that most federal court decisions regarding road maintenance have held that decisions with respect to road maintenance are

"discretionary functions," and therefore immune from suit.[7] However, regarding decisions of how and where to post signs warning of dangerous road conditions, the federal courts have not indicated a consistent pattern. Some courts hold that such signing decisions are discretionary functions and some courts hold that they are not discretionary functions.[8] For both road maintenance decisions and decisions on how and where to post signs, the prerequisite is that there cannot be a specific and mandatory statute regarding how the decision is to be made. It also is a prerequisite that the county or township has not been negligent. Generally, however, if the counties and townships follow the applicable procedural statutes, present a good faith effort to minimize risk to the public, and base their maintenance and signing decisions upon various factors, such as cost, public safety, available alternatives, etc., and if the counties and townships also hold public hearings and adequately document their decisions, then the counties and townships dramatically increase the chances that their actions can be classified as "discretionary functions." Such a classification minimizes, or eliminates, tort liability.

Negligence Duty versus a Statutory Duty

To minimize tort liability, counties and townships must act in accordance with the duty they owe to the public. There are generally two types of duties: (1) statutory duty--the duty owed by the political subdivisions to the public according to statute, and; (2) negligence duty--the duty owed by the political subdivisions to the public according to general principles of negligence.

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[7] See *Cope v. Scott*, 45 F.3d 445 (D.C.Cir. 1995); *Pifer v. U.S.*, 903 F. Supp. 971 (N.D.W.Va. 1995); *Childers v. U.S.*, 40 F.3d 973 (9th Cir. 1995); *Rothrock v. U.S.*, 62 F.3d 196 (7th Cir. 1995); *Baum v. U.S.*, 986 F.2d 716 (4th Cir. 1993); *Bowman v. U.S.*, 820 F.2d 1393 (4th Cir. 1987). *Also see ARA Leisure Services v. U.S.*, 831 F.2d 193 (9th Cir. 1987).

[8] For an extremely useful general discussion about traffic control devices and their relationship to discretionary decisions, see pages 3-5 of the 1992 NACE publication on Tort Liability.

Statutory duties are relatively straightforward and can be found in statutory sections of the North Dakota Century Code. For example, to close a road, political subdivisions must act in accordance with N.D.C.C. section 24-07-05. This fulfills their statutory duty. The statutory duties that counties and townships must fulfill in their road closure and signing decisions are detailed in Chapter 3 of this report.

Negligence principles, on the other hand, are more obscure. There are four elements to a basic negligence claim[9]. These elements are:

(1) A duty on the part of an allegedly negligent person to protect the plaintiff from injury.
(2) A failure to discharge the duty.
(3) A resulting injury.
(4) Proximate causation of the resulting injury by the breach of the duty.

For the purposes of this report, the primary concern is the first element; the duty. The question is: what duty do political subdivisions in North Dakota owe to the public in the maintenance and signing of county and township roads? Fortunately, the North Dakota Supreme Court has given some direction, as follows:

> . . . there is a duty to erect barriers or railings along highways and roads to make the way safe from hazardous or dangerous conditions for travelers using ordinary care. A necessary corollary is that there is no duty to put a guardrail or barrier on a road where a dangerous or unusually hazardous condition does not exist for travelers exercising ordinary care. These principles necessarily require that the streets are used lawfully. The duties of the various political subdivisions in connection with building and maintaining roads do not include a lagniappe in the form of additional precautionary measures to protect persons from their own careless acts. Interrelated with these concepts are the principles that counties and townships cannot be insurers against accidents because their resources are limited and must be used as efficiently as possible.[10]

In a 1982 tort lawsuit, the North Dakota Supreme Court held in favor of a county because "the intersection, controlled as it was by a stop sign, did not represent an unreasonable risk or dangerous condition to prudent individuals lawfully using the road." This is a clear statement of the duty owed by

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[9] *Diegel v. City of West Fargo*, 546 N.W.2d 367, 370 (N.D. 1996).

[10] *Delair v. County of LaMoure*, 326 N.W.2d 55 (N.D. 1982).

political subdivisions to persons using their roads. That is, as long as the road is not a "dangerous or unusually hazardous condition to a driver exercising ordinary care and driving within the limits of the law," then counties and townships are fulfilling their duty in signing and maintaining the road.

A more recent case, *Diegel v. City of West Fargo*,[11] stated the duty in another way: "A municipality, however, has a duty under negligence principles to exercise reasonable care to keep its streets reasonably safe for use by the public and to guard against unreasonably dangerous conditions which can be foreseen in the exercise of reasonable prudence and case."

In making and executing road closure and signing decisions, counties and townships must fulfill their statutory duties and their negligence duties to the public. In doing so, the tort liability of the counties and townships is minimized.

[11] *Diegel v. City of West Fargo*, 546 N.W.2d 367, 370 (N.D. 1996).

CHAPTER 3

ALTERNATIVES AND LEGAL IMPLICATIONS

This chapter provides a list of alternatives to be considered when making a road closure decision. The three main alternatives that are covered are closing, abandoning, or assigning minimum maintenance designation to the road. In addition, this chapter provides detailed lists of the proper statutory procedures for each alternative. Although these procedures are a useful guide for counties and townships in making and implementing their road closure decisions, they are not intended to be a formal legal opinion. Such an opinion can only be issued by a licensed attorney.

MINIMUM MAINTENANCE ROADS

When counties and townships do not desire to close a road, but also are unable to spend the time and resources necessary to keep the road on a full-time maintenance schedule, an alternative is to assign a "minimum maintenance" designation to the road.[12] Although minimum maintenance roads are not defined in the North Dakota Century Code, apparently such a designation can be year-round or seasonal. Minnesota is another state that uses a minimum maintenance road designation, and their legislative documentation was compared with North Dakotas legislative documentation in assembling this report.[13]

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[12] The procedures for minimum maintenance roads are set forth in sections 24-07-35, 24-07-36 and 24-07-37 of the North Dakota Century Code.

[13] Specifically, see the Minnesota Manual on Uniform Traffic Control Devices, and Minnesota Statutes Annotated section 160.095. Minnesota's statutory language is similar to North Dakota's, but Minnesota's sign requirements are more precise, and formally adopted by the Minnesota Manual on Uniform Traffic Control Devices.

Minimum Maintenance Roads and Relevant N.D.C.C. Sections

Regarding tort liability, N.D.C.C. section 32-12.1-03(7) explicitly refers to minimum maintenance roads, and the tort liability of counties and townships for assigning such a designation.[14] In layman's terms, it states that a county or township is not liable in tort for a claim based upon the designation, repair, operation or maintenance of a minimum maintenance road if the county or township follows the procedural requirements of the North Dakota Century Code when the county or township designates the road as a minimum maintenance road, and if the road is maintained well enough "to serve occasional and intermittent traffic."[15]

The procedural requirements of the North Dakota Century Code are found in sections 24-07-35, 24-07-36, and 24-07-37, and are set forth below. Of the three alternatives covered in this chapter, this alternative is most clear in terms of tort liability. That is, in designating a road as a minimum maintenance road, if the county or township complies with the procedural requirements of the North Dakota Century Code, and as long as they are not negligent, then liability in tort is eliminated.

Preliminary Questions Before Designating a Minimum Maintenance Road

There are four preliminary questions that must be answered before proceeding with a minimum maintenance road.

(1) Is the road used as a school bus route, mail route, or as the only access to an existing residence?

(2) Would federal highway aid to the state be reduced if the road in question is designated as a minimum maintenance road?

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[14] The full text of sections 32-12.1-03, 24-07-35, 24-07-36, and 24-07-37 are reproduced in the Appendix of this report.

[15] For more comments on the phrase "occasional and intermittent traffic," see the comments later in this section and the recommendations in Chapter 4.

If the answer to either of the above questions is "yes," then the road cannot be designated as a minimum maintenance road. If the answer to both questions is "no," then proceed to the next preliminary question.

(3) Is the designation of the minimum maintenance road necessary for drainage or public safety?

If the answer to question 3 is "yes," then skip question 4 and proceed according to the following procedures. If "no," then proceed to the next preliminary question.

(4) Is additional right of way or easement by eminent domain required for constructing or designating the minimum maintenance road?

If the answer to question 4 is "yes," then the consent of the landowner must be acquired by the county or township board before constructing or designating the minimum maintenance road. If "no," then proceed according to the following procedures.

Procedures for Designating a Minimum Maintenance Road

1. The county or township may designate the road as a minimum maintenance road.[16]
2. The board must determine that the road is only used "occasionally or intermittently" for commercial and passenger travel.
3. The board must identify the beginning and end of the road.
4. The board must notify each adjoining political subdivision of the designation made under this section.
5. If the road runs along the boundary of political subdivisions, then boards from both political subdivisions must agree with the designation of the road as a minimum maintenance road.
6. The board must post signs at the beginning of the road and at regular intervals along the road.

[16] For all decisions of minimum maintenance designation or closing a road, see N.D.C.C. section 24-07-04 for details on which board (county or township) makes the decision. N.D.C.C. section 24-07-04 also is important with decisions that must be made when a road is on the border between a township and a county, etc.

7. The posted signs must conform to the standards adopted by the director of the DOT by rule.

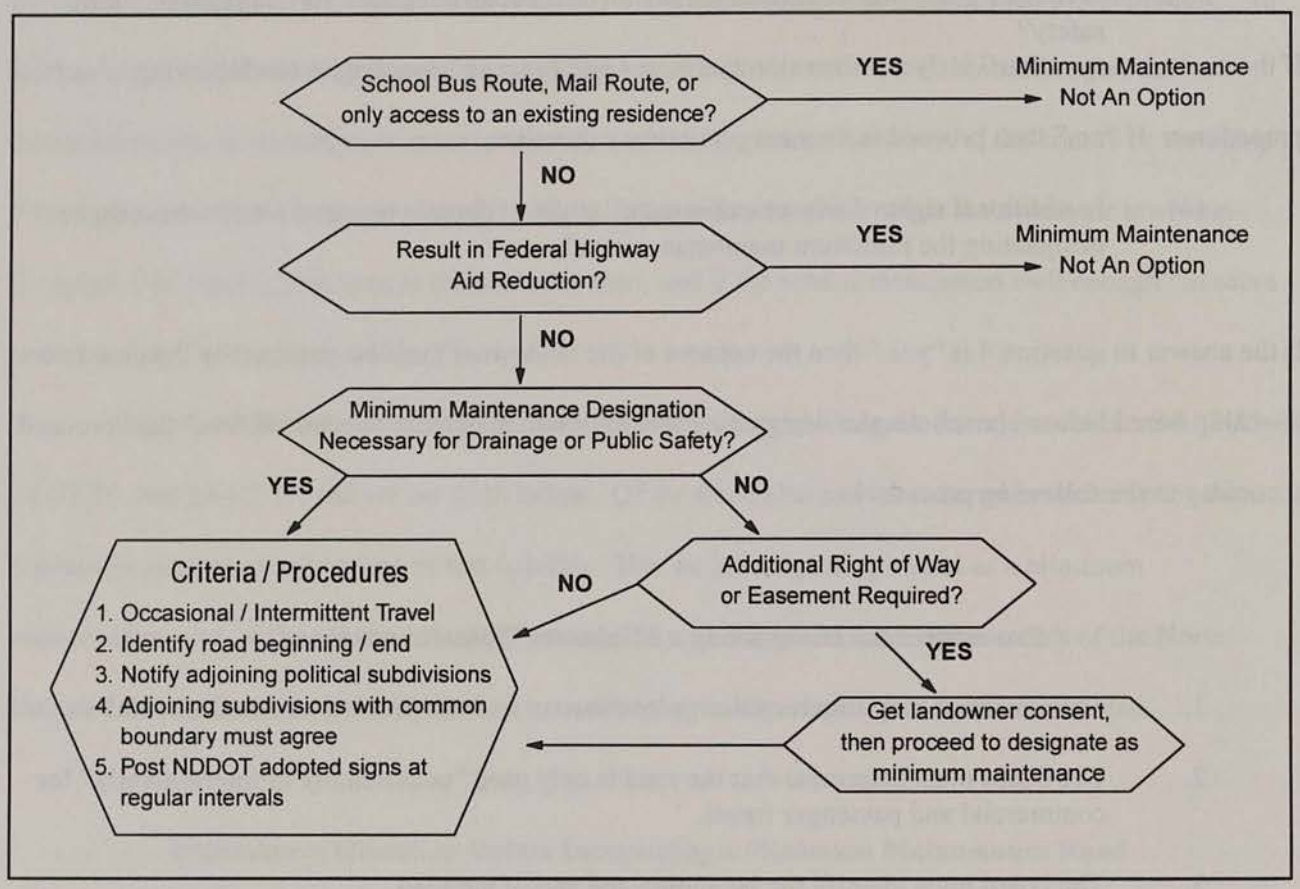


Figure 3.1 Procedure for Declaring a Minimum Maintenance Road

Minimum Maintenance Road Sign Specifications

The specifications and installation of minimum maintenance road signs are outlined in the North Dakota's Administrative Code Chapter 37-07-01. The code indicates the signs must be installed from six to 12 feet from the shoulder line of the roadway, and the bottom of the sign panel must be at least five feet above the roadway surface. The signs should have a fully reflectorized white background with a

black nonreflectorized legend. The lettering should be three inches high and must be of "series C" size according to the Traffic Control Devices Handbook published by the state highway department.

North Dakota has developed a series of three minimum maintenance signs to be posted (Figure 3.2). At the start of the minimum maintenance road, a sign reading "Begin Minimum Maintenance Road" is stationed. The next sign that should be placed at regular intervals along the road should read, "Minimum Maintenance Road." At the end of the minimum maintenance road, another sign should be posted which reads, "End Minimum Maintenance Road." The intervals at which these signs are to be posted is left to the discretion of the county or township road officials.

Interestingly, Minnesota's minimum maintenance road signs are quite different in color, size, and content from North Dakota's signs (Figure 3.3). First, Minnesota minimum maintenance signs are the standard color of a warning sign - yellow and black. Second, Minnesota's minimum maintenance signs are larger than North Dakota's. Minnesota signs are 36 inches by 30 inches while North Dakota's signs are 24 inches by 30 inches. Third, Minnesota requires one sign that reads "Minimum Maintenance Road Travel at your own Risk" placed at regular intervals along the road, while North Dakota has three signs as mentioned in earlier. The photo in Figure 3.4. depicts the placement of a minimum maintenance road sign in Minnesota.

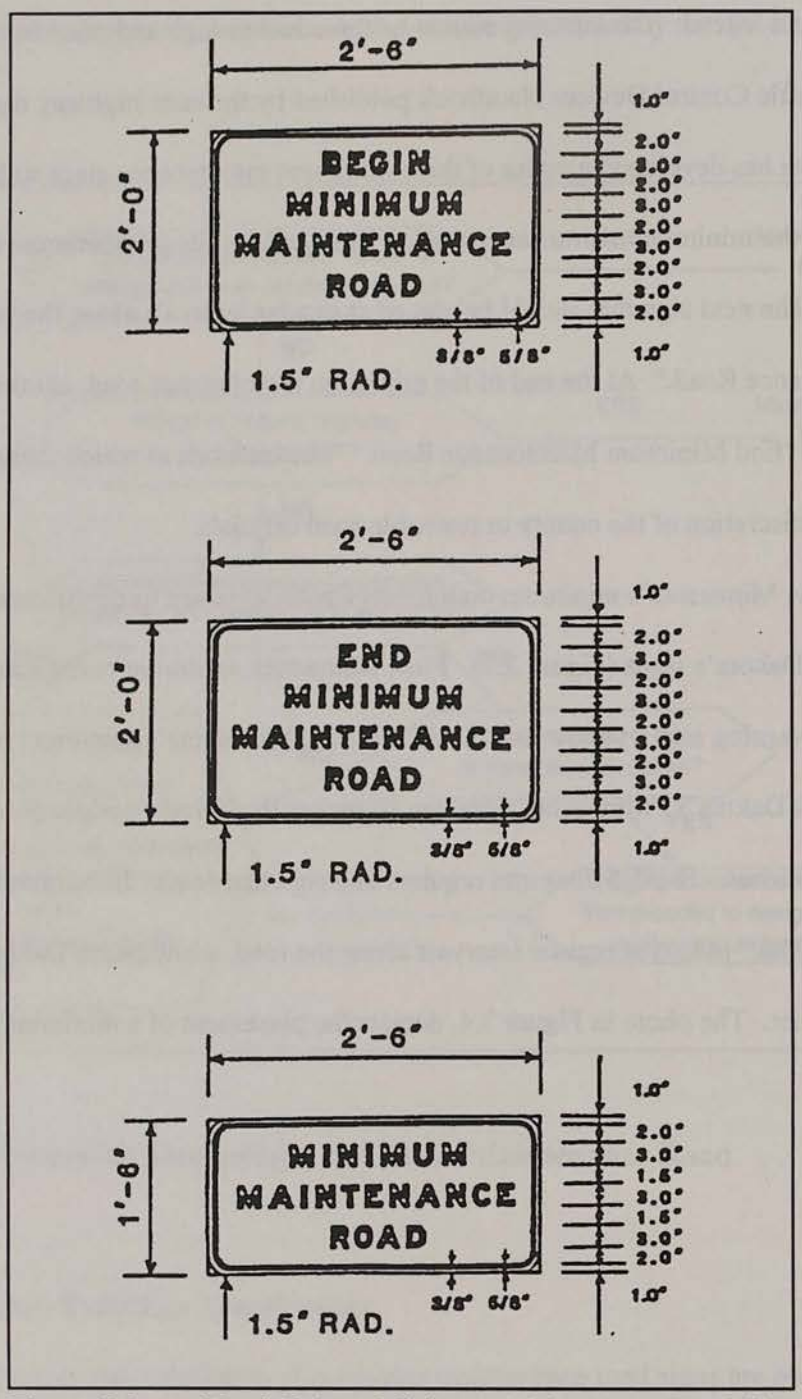
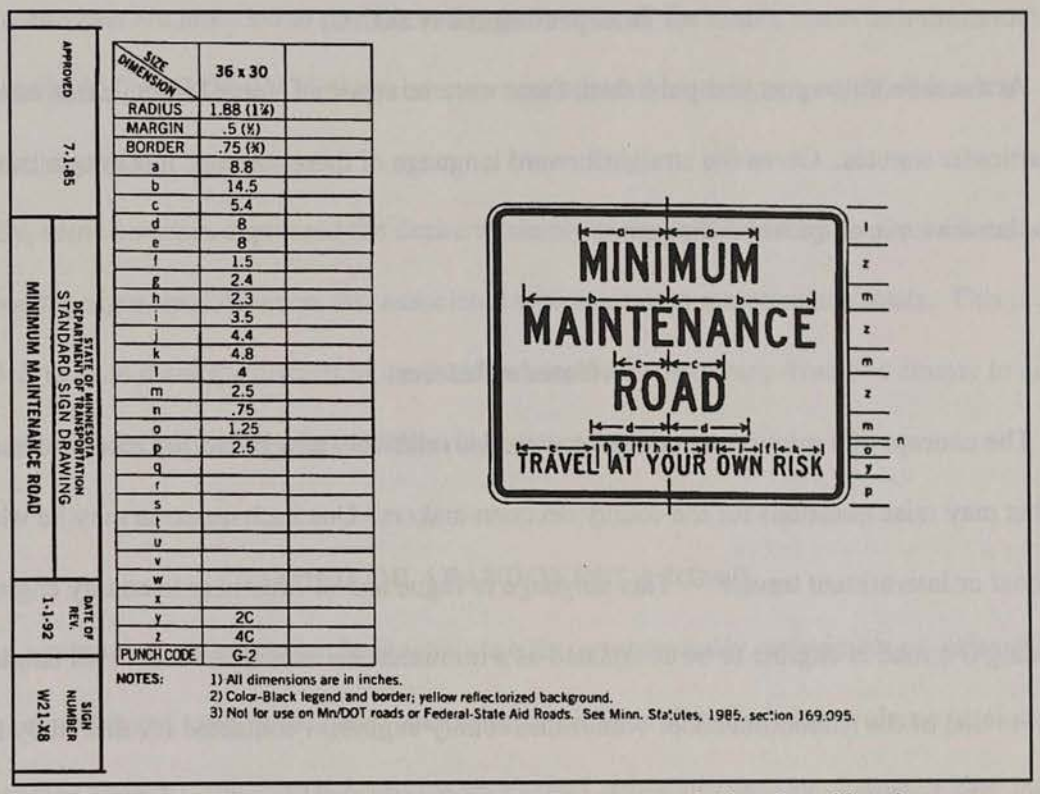


Figure 3.2 North Dakota Minimum Maintenance Road Sign Specifications

SOURCE: North Dakota Administrative Code, Chapter 37-07-01.



SIZE / DIMENSION	36 x 30	
RADIUS	1.88 (1¾)	
MARGIN	.5 (½)	
BORDER	.75 (¾)	
a	8.8	
b	14.5	
c	5.4	
d	8	
e	8	
f	1.5	
g	2.4	
h	2.3	
i	3.5	
j	4.4	
k	4.8	
l	4	
m	2.5	
n	.75	
o	1.25	
p	2.5	
q		
r		
s		
t		
u		
v		
w		
x		
y	2C	
z	4C	
PUNCH CODE	G-2	

NOTES:
1) All dimensions are in inches.
2) Color-Black legend and border; yellow reflectorized background.
3) Not for use on Mn/DOT roads or Federal-State Aid Roads. See Minn. Statutes, 1985, section 169.095.

Figure 3.3 Minnesota Minimum Maintenance Road Sign Specifications.

SOURCE: Minnesota Department of Transportation.

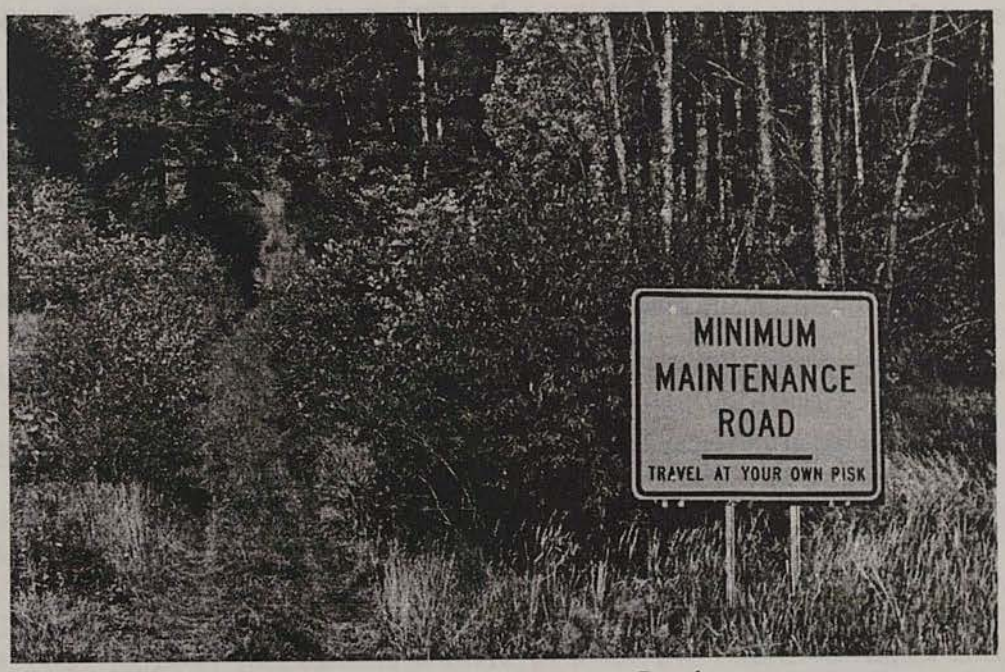


Figure 3.4 Minnesota Minimum Maintenance Road.

NOTE: This sign was enlarged in the photograph to show the text message.

Interpreting the N.D.C.C.

At the time this report was published, there were no reported North Dakota cases interpreting these particular statutes. Given the straightforward language of these statutes, it is not unusual that they have not been a topic of extensive litigation.

Notes of Interest

The concept of a minimum maintenance road is relatively new in North Dakota. There are some issues that may raise questions for the county decision makers. One such question may be what is "occasional or intermittent travel?"[17] This language is vague and of little help to county engineers in determining if a road is eligible to be designated as a minimum maintenance road. This language is identical to that of the Minnesota code. Minnesota county engineers contacted for this study had similar criticism of the language. One Minnesota county engineer said that his county did not even utilize the minimum maintenance designation because of the vagueness of the phrase "occasional and intermittent travel." Instead, the county simply leaves the road alone, abandoning it for maintenance purposes. Surely this is not the intent of the legislature in passing this statute, and the language of the statute should be clarified.

Furthermore, the North Dakota Century Code refers to signing "standards adopted by the director by rule."[18] This is a reference to the Manual on Uniform Traffic Control Devices (MUTCD), which has been adopted by the North Dakota Legislature.[19] The MUTCD indicates that warning signs different from those specified in the manual may be required under special conditions. Since the minimum

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[17] See N.D.C.C. section 24-07-35.

[18] See N.D.C.C. section 24-07-36.

[19] The MUTCD is produced by the United States Department of Transportation and is adopted in North Dakota in accordance with N.D.C.C. section 39-13-06.

maintenance road signs are intended to provide "adequate notice of the road's status as a minimum maintenance road," N.D.C.C. 24-07-36, the minimum maintenance road signs would fall into the category of warning signs.

Finally, some counties expressed the desire to simply close roads, as they do not wish to incur the costs of posting signs, maintenance, etc. associated with minimum maintenance roads. This is a matter to be left to each county's discretion, as costs and considerations vary from one county to another. Road closure procedures are covered in the following section.

CLOSING OR ABANDONING A ROAD

When a minimum maintenance designation is either economically undesirable or unfeasible for other reasons, counties and townships may wish to simply close or abandon a low-volume rural road. The North Dakota Century Code does not provide procedural guidelines for abandonment of county or township roads, per se.[20] However, the N.D.C.C. does contain detailed statutory procedures for closing roads, and those statutory procedures are set forth in this section.[21]

Tort Liability/Relevant N.D.C.C. Sections

The procedure followed to close a road is considerably more complicated than designating a minimum maintenance road.

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[20] Section 24-01-06 addresses the abandonment of roads on the state highway system, but this statute apparently does not apply to county or township roads.

[21] See N.D.C.C. sections 24-07-03, 24-07-05, 24-07-08, 24-07-09, 24-07-10, 24-07-11, 24-07-12, 24-07-13, 24-07-14, 24-07-15, 24-07-16, 24-07-17, 24-07-18, 24-07-20, 24-07-22, 24-07-23, 24-07-24, 24-07-26, 24-07-27, 24-07-28, 24-07-29, 24-07-30, 24-07-31, 24-07-33, 24-07-34. Obviously, given the number of statutes involved in this section, a county or township should consult a licensed attorney when they decide to close a road.

It is highly advised that in reading this section, counties and townships review the discretionary function section of Chapter 2 of this report. Counties and townships should remember that if road closure decisions qualify as discretionary functions, then counties and townships might eliminate their tort liability for such decisions. Some helpful criteria include:

- absence of negligence;
- a good faith effort to minimize risk to the public;
- compliance with the North Dakota Century Code;
- public hearings on road closure decisions;
- balancing of many factors, such as public safety, economic cost, available alternatives;
- documentation of the decision making process; and
- contacting the Office of the Attorney General for clarification on recurring questions.

The procedural requirements of the North Dakota Century Code primarily are found in sections 24-07-05 and 24-07-03, and are set forth below. Due to the detail of the procedural requirements and the lack of statutory direction regarding the tort liability associated with closing a road, consultation with a licensed attorney is vital in making and implementing road closure decisions.

Case Law Interpreting the N.D.C.C.

Although there are not recent cases interpreting N.D.C.C. section 24-07-05, there has been considerable judicial interpretation of N.D.C.C. section 24-07-03. One of the most pertinent cases for this report is a 1982 North Dakota Supreme Court case.[22] In that case, the court held that

> We conclude a public road, as contemplated by N.D.C.C. section 24-07-03 does not impose a duty on a county or township to maintain an improved road on the section line. A county or a township does not have a duty to maintain an improved road on each section line, nor do we believe a county or a township can be held legally liable for injuries to persons using a portion of a designated public road which the county or township has not undertaken to improve.

[22] Delair v. County of LaMoure, 326 N.W.2d 55 (N.D. 1982).

Furthermore, the attorney general did issue an opinion (96-21) on Nov. 5, 1996, to District 20 Representative Ole Aarsvold of Traill County,

> It is my opinion that a county or township is not legally liable for injuries to persons using a portion of a previously designated improved road which has been closed pursuant to statute where the governing body has taken precaution not to create an unreasonably dangerous condition for drivers exercising ordinary care, nor is a county or township legally liable to travelers on minimum maintenance roads maintained according to N.D.C.C. 32-12.1-03(6).

Before a county or township may be held legally liable for negligence, it must be found that the county or township had a duty to protect the plaintiff from injury, failed to discharge that duty, and that there was an injury proximately caused by the breach of that duty.[23] "If no duty exists on the part of the alleged tortfeaser, there is no actionable negligence."

If an improved roadway has been created and subsequently is closed or no longer maintained, the political subdivision that has jurisdiction over the roadway may become liable to any person traveling upon the roadway. If the deteriorated condition creates a pitfall, trap, or snare is an individual factual issue. [24] Under appropriate circumstances, warning signs or protective barricades may be sufficient to prevent prudent drivers from entering a closed or unmaintained road. [25]

Procedures for Closing or Abandoning a Road

There are three preliminary questions that must be answered before proceeding with closing or abandoning a road. There also are three options from which to chose when selecting the proper procedure to follow when closing or abandoning a road. These options are presented below.

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[23] See Diegel v. City of West Fargo, 546 N.W. 2d 367, 370 (N.D. 1996).

[24] See Diegel, 546 N.W. 2d at 371-373; Belt, 68 N.W. 2d ata 122-123.

[25] See Trihub, 23 N.W. 2d at 754-756 (question for jury whether allowing barricades to deteriorate was negligence by city.

Preliminary Questions

(1) Has the road been used in the past ten years?

If the answer to question 1 is "yes," then proceed to the next preliminary question. If "no," then formally closing the road is not necessary. The road is declared statutorily vacant.[26]

(2) Is there a bridge located on any part of the road to be closed?

If the answer to question 2 is "yes," then the statutory procedures of N.D.C.C. sections 24-08-01 and 24-08-03 must be complied with. Due to their complicated nature, sections 24-08-01 and 24-08-03 are beyond the scope of this report. If the answer to question 1 is "yes," consult a licensed attorney. If "no," then proceed to the next preliminary question.

(3) Is the road, or any portion of the road, located on a congressional section line?

If the answer to question 3 is "yes," then closing the section line may be an option. However, while closing a section line is an option, it may not be necessary.[27] Nevertheless, if a county or township does choose to close the section line, see below for the proper procedures (Option #3). If "no," then proceed to options 1 and 2.

<u>Procedures</u> for closing a road that is not located on a congressional section line.

Please note: in closing a road that is not located on a congressional section line, but has been used in the past 10 years, there are two (2) procedural choices. They are listed as "Option #1" and "Option #2."

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[26] See N.D.C.C. section 24-07-31.

[27] See Chapter 4. One of this report's recommendations is that an Attorney General's Opinion (AGO) be solicited regarding the question of whether a county must close a section line when closing a road that is located on a section line.

Option #1

1. To alter or discontinue a road, the county or township board must receive the petition of at least six qualified electors with an ownership interest in the real estate in the vicinity of the road to be altered or discontinued.[28]

2. The petition must legally describe the portion of the road to be altered or discontinued.

3. The petitioners must post copies of the petition in three of the most public places in the county or township.

4. The petition must be posted for 20 days before the board takes any action upon the petition.[29]

5. Within 30 days after the board receives the petition, the board must make a notice fixing a time and place of meeting to decide on the petition.

6. At least 10 days prior to the meeting, the petitioners and/or the board must give notice to all occupants of land through which the road passes. This notice must be served personally or by copy left at the occupants abode.

7. The board also must post copies of the notice in three public places of the county or township. The notice must be posted at least 10 days prior to the meeting. As in procedure #2, the notice must specifically describe the road.

8. The board must then examine the road, hold a public hearing, and hear reasons for or against the discontinuance or altering of the road. A decision is then made by the board as it deems proper.

9. Upon making the decision, the board must then write a survey with an accurate description of the road. The description is incorporated into an order to be signed by members of the board.

10. The order and all the petitions and affidavits of service and postings of notices is filed with:
    a) The county auditor, if the board making the decision is the board of county commissioners.
    b) The township clerk, if the board making the decision is the township board.

    In either case, the auditor or clerk must note the time of filing.

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[28] Title 24 of the N.D.C.C. apply to all state lands as well, for specific procedures when state land is involved when closing a road, see N.D.C.C. section 24-07-08.

[29] See N.D.C.C. section 24-07-12. If the petition is for altering or discontinuing a road between two or more counties, then the petition must be filed with the auditor of one of the counties at least 15 days before any action is taken. The auditor immediately must transmit certified copies of such petition to the auditors of all other counties to be affected. Each auditor must lay such petition before the board of county commissioners of his county at its next meeting for action in the matter as provided in N.D.C.C. title 24.

11. If the board refuses to alter or discontinue a road, then the board must note so on the back of the petition and file the petition.[30]

12. All orders, petitions, and affidavits must be made out and filed within five days after the date of decision.

13. However, the county auditor or township clerk may not record the order within 30 days, nor until a final decision is had, and then not unless such order is confirmed.

14. When the order has been recorded by the county auditor or township clerk, it must be filed in the Office of the County Auditor.

15. If the board does not file the order within 20 days after it is recorded, then the board is deemed to have decided against the application.

16. When any highway is to be changed, the county auditor or township clerk shall notify the overseer of highways of each district affected and shall furnish him with a certified copy of the proceedings of the board.

Option #2

1. If at least 70 percent of the qualified electors who are owners or part owners of land bordering on any existing or proposed road have signed the original petition, and those electors have thereby released all their claims to damages arising from the discontinuing or altering of the road, then copies of the petition do not need to be posted or served (as detailed throughout Option #1).

2. However, notices must be served personally or left at the abode of those occupants who did not sign the petition, and whose land borders the road.

4. The board may then proceed with a public meeting.

5. The remaining procedures for option #2 are the same as steps 8 - 16 in Option #1.

Option #3 Procedures for closing a road, or any portion of a road, located on a congressional section line.[31]

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[30] Such a refusal is final for one year. See N.D.C.C. section 24-07-18. Petition can be made again after one year.

[31] After a section line is closed, it may be leveled and farmed by the adjacent landowners or tenants, only if the leveling or farming does not disturb, remove, or destroy any survey or property reference monument. However, if drainage is interfered with due to the farming operations, alternate means of drainage must be provided for by the landowners or tenants farming such lands.

1. The closing action must be taken by the board of county commissioners.

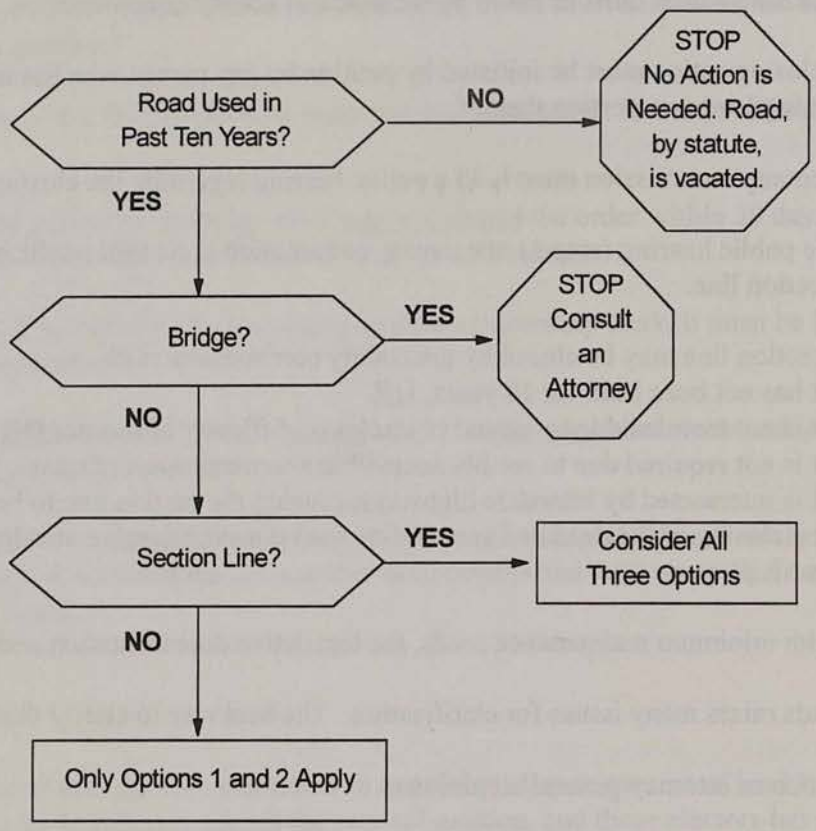
2. The closing action must be initiated by petition by <u>any</u> person who has an interest in the adjoining land or a portion thereof.

3. The county commission must hold a public hearing regarding the closing of the section line.

4. At the public hearing (step 3), the county commission must find public benefit in the closing of the section line.

5. The section line may be closed by the county commissioners if:
   a) It has not been used for 10 years; **<u>OR</u>**
   b) It is not traveled due to natural obstacles or difficulty of terrain; **<u>OR</u>**
   c) It is not required due to readily accessible alternate routes of travel; **<u>OR</u>**
   d) It is intersected by interstate highways, causing the section line to be a dead end, so long as the closing of the dead end section line road does not deprive an adjacent landowner access to his property.

As with minimum maintenance roads, the legislative documentation and case law regarding closure of roads raises many issues for clarification. The best way to clarify these issues is either through legislative action or attorney general's opinions.



Option 1

Step 1. Petition from 6 electors, with legal description of road.
Step 2. Post petition in 3 most public places for 20 days.
Step 3. After Step 2, set meeting within 10 days.
Step 4. Ten days prior to meeting, personally notify landowners, & post in 3 most public places.
Step 5. Hold hearing, make decision. Refusal is final for one year.
Step 6. File materials within 5 days, wait for auditor/clerk to record.
Step 7. File recorded order within 20 days. Notify overseer of highways.

Option 2

Step 1. Petition from 70% of qualified electors.
Step 2. Personal notice to qualified electors who didn't sign petition in Step 1.
Step 3. Continue with Step 5 of Option 1.

Option 3

Step 1. Petition by any person with an interest in adjoining land.
Step 2. Public hearing.
Step 3. Find "public benefit."
Step 4. Closing okay if:
a. No use for 10 years; or
b. No travel due to obstacles/ terrain; or
c. Not required due to readily accessible alternate route of travel; or
d. Interstate intersection causes dead end.

Figure 3.5 Procedures and Options for Closing A Road

Further Need for Attorney General's Clarification

With regard to the statutory procedures for closing a road, there is need for legislative clarification. For example, what does "in the vicinity" mean in N.D.C.C. section 24-07-05? Who decides whether a road has been used in the past 10 years in N.D.C.C. section 24-07-31? Is section 24-07-31 even applicable to the abandonment of roads that have been "opened," or just to roads that have been "laid out" and not "opened"? What does "public benefit" mean in N.D.C.C. section 24-07-03? Who initiates the petition in section 24-07-05? What if there is only one landowner, then how does a petition get started? All these are issues that need legislative or attorney general's clarification.

CHAPTER 4

SUMMARY AND CONCLUSIONS

In this chapter, a summary of the study is presented. In addition, conclusions drawn from the statutes and cases reviewed are presented. Finally, study limitations and the need for further research also are addressed.

SUMMARY

North Dakota has an extensive road system. The state has more miles of road per capita than any other state in the nation. However, a current trend of out-migration of North Dakota's young residents to urban centers raises concern of a reduced the tax base. A decline in the tax base will lead to increasingly limited funds for maintaining the road network. In addition, the level of federal funds received is uncertain. When new federal transportation policy is written, North Dakota may not receive the same level of federal dollars. Currently, North Dakota receives about $1.80 for every $1 paid in. Because donor states are arguing that they are not receiving their fair share of federal dollars, the formula may be recalculated and North Dakota may find they have even fewer dollars.

The road system has various levels of traffic across the network. Some roads serve seasonal traffic while other roads serve increased traffic levels due to shifts in traffic patterns. Because of the differences in traffic levels among roads, uniform expenditures on the road system cannot be justified. North Dakota's Governor Schafer indicated in his 1997 State of the State address, the state has a need to prioritize their roads system. Roads with higher traffic volumes would have a higher priority and will receive more dollars to sustain adequate maintenance levels.

The large number of miles of road, limited budgets, and shifts in traffic patterns create unique opportunities and challenges for road officials and decision makers. Fewer dollars will likely translate into a need to reduce the road system or reduce the maintenance of certain roads. Several approaches may be used by local governments to address their road challenges. These approaches may include

1) declaring some roads as minimum maintenance 2) closing or abandoning roads with extremely low traffic flows. There are legal implications to these approaches that could limit government agencies ability to make these decisions or could result in tort liability issues later on. There are statutes in the North Dakota Century Code (N.D.C.C.), which identify the proper procedure to follow when implementing either of these options.

Tort liability issues are especially important to counties due to the elimination of governmental immunity. Prior to 1974, counties were immune from lawsuits. Today political subdivisions only have immunity if their actions are characterized by discretionary function exemptions. This study examined two tests which can be used to determine if a discretionary function exemption does exists. Political subdivisions do owe the general public a road system free from hazardous or dangerous conditions for travelers using ordinary care.

To reduce county road miles or road maintenance, counties must act in accordance with applicable statutes. To close a road, political subdivisions must act in accordance with N.D.C.C. section 24-07-05. When counties and townships do not want to fully close a road, but are unable to spend the time and resources necessary to keep the road on a full-time maintenance schedule, they may possibly declare the road as minimum maintenance as long as sections 24-07-35, 24-07-36, and 24-07-37 of the N.D.C.C. are followed. Following the proper procedures are key to reducing the liability of the political subdivision.

The decision charts developed in this report show the proper procedures necessary to close or abandon a road or declare it a "minimum maintenance" road. Although these procedures are based on the law, they serve as guidance only and counties should consult with a licensed attorney for specific cases.

CONCLUSIONS

The N.D.C.C. describes the proper procedures counties and townships must follow when declaring minimum maintenance roads or closing roads. The procedures are well organized and if followed correctly, can significantly reduce the likelihood of lawsuits against the political subdivision.

It would be beneficial for political subdivisions to collect data, i.e., maintenance costs, traffic counts, etc. for the roads they are responsible for to determine the roads that may be more justifiably declared minimum maintenance or closed. Using the data, road officials can more easily justify the benefits and costs of implementing one of these options.

Public input also can play an important role in the implementation of any of the options. A public hearing is required for closing roads, unless the road has not been used in 10 years, in which case the road is by statute, vacated. Public input can make the process easier for the road officials because if the road users are satisfied with the justification, the process will be easier to implement. In addition, the public input process can be used to educate road users about the current financial situation and also to gain road users perspectives on critical road needs. Furthermore, road users may have ideas on how to better utilize the road network, and potential funding mechanisms.

Counties and townships cannot completely eliminate tort liability. There will always be plaintiffs who file lawsuits based upon a perceived violation of their rights. However, with regard to closing, abandoning, or assigning minimum maintenance designation to low-volume rural roads, the North Dakota Legislature has given counties and townships considerable direction. This direction is in the form of statutes, which list the proper procedures for counties and townships to follow in road closure decisions.

In spite of these statutes, there is room for improvement. Generally, clarifications can be made in one of two ways. They can be solicited in the form of Attorney General's Opinions, or they can be made legislatively, as statutes. Statutes are considered to be "mandatory" authority by a court. In layman's

terms, this means they are "binding" upon a court of law. Attorney general's 0pinions are considered "persuasive" authority by a court. That is, while attorney general's opinions are considered by a court of law, they are not "binding" in the court's decision-making process. However, the advantage of attorney general's opinions over statutes are that attorney general's opinions are not subject to the long and detailed legislative process that statutes are subject to. Attorney general's opinions can be solicited by a city, county, or state's attorney, or by a state senator or representative. The process of submitting the question and receiving the Opinion takes about a month.

BIBLIOGRAPHY

North Dakota Century Code, Michie Butterworth Law Publishers, Charlottesville, Virginia, 1995.

United States Department of Transportation. *Manual on Uniform Traffic Control Devices.* Federal Highway Administration, Washington, D.C., 1988.

South Dakota Transportation Technology Service. *Traffic Control Practices for Low Volume Local Roads*. Brookings, South Dakota, 1993.

Minnesota Department of Transportation. *Minnesota Manual on Uniform Traffic Control Devices*. St. Paul, Minnesota, 1991.

National Association of County Engineers. *NACE Action Guide Volume I-7, Tort Liability.* Washington, D.C., 1992.

APPENDIX A
RELEVANT RURAL ROAD NORTH DAKOTA CENTURY CODE SECTIONS

North Dakota Century Code - Relevant Rural Road Sections

24-07-02. Established roads are public highways. Every road laid out by the proper authorities, as provided for in this chapter, from the laying out of which no appeal has been taken within the time limited for taking such appeal, hereby is declared a public highway to all intents and purposes, and all persons having refused or neglected to take an appeal, as provided for in this chapter, are debarred forever from any further redress.

24-07-03. Section lines considered public roads-Closing same under certain conditions. In all townships in this state, outside the limits of incorporated cities, and outside platted town sites, additions, or subdivisions recorded pursuant to sections 40-50.1-01 through 40-50.1-17 or recorded prior to July 1, 1987, under former chapter 40-50, the congressional section lines are public roads, open to width of thirty-three feet [10.06 meters] on each side of such section lines.

The board of county commissioners, if petitioned by a person having an interest in the adjoining land or a portion thereof, is authorized, after public hearing and a finding by the commissioners of public benefit, to close section line roads or portions thereof which are not used for ten years, are not traveled due to natural obstacles or difficulty of terrain, are not required due to readily accessible alternate routes of travel, or are intersected by interstate highways causing such section line road to be a dead end, providing the closing of such dead end section line road does not deprive adjacent landowner access to his property. After such section line roads are closed they may be leveled and farmed by the adjacent landowners or tenants, only if the leveling or farming does not disturb, remove, or destroy any survey or property reference monument. However, if drainage is interfered with due to the farming operations, alternate means of drainage must be provided for by the landowners or tenants farming such lands.

[**Improved Roads.** This section does not impose a duty on a county or township to maintain an improved road on a section line, nor can a county or township be held legally liable for injuries to persons using a portion of a designated public road which the county or township has not undertaken to improve. DeLair v. County or LaMoure (1982) 326 NW 2d 55.]

24-07-05. Petition for laying out, altering, or discontinuing roads. The 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. Said petition must set forth in writing a description of the road and what part thereof is to be altered or discontinued, and if for a new road, the names of the owners of the land, if know, over which the road is to pass, the point at which it is to commence, its general course, and the point where it is terminate.

[**Township Supervisors.** The board of township supervisors of an organized township has jurisdiction to receive and act upon a petition to vacate a highway situated within the township. Morton County v. Forester (1918) 40 ND 281, 168 NW 787.

24-07-35. Designation of minimum maintenance road. A board having jurisdiction as described in this chapter, and the governing body of a city, may designate a road under its jurisdiction as a minimum maintenance road in accordance with sections 24-07-35 through 24-07-37. The designation may be made only if the board or governing body determines that the road to be so designated is used only occasionally or intermittently for passenger and commercial travel. Further, the designation cannot be made if the road is used as a schoolbus route, mail route, or as the only access to any existing residence. In its action designating the minimum maintenance road, the board or governing body shall notify each adjoining political subdivision of a designation made under this section. If a road runs along the boundary of

political subdivisions, the designation as a minimum maintenance road is not applicable unless the board or governing body of each adjoining political subdivision agrees with the designation.

24-07-36. Required signs on minimum maintenance roads. The body making a designation of a minimum maintenance road shall post signs at the beginning of the road and a t a regular intervals along the road. The signs must conform to standards adopted by the director by rule. If the signs are properly posted, that fact is prima facie evidence that adequate notice of the road's status as a minimum maintenance road has been given to the public.

24-07-37. Limitations on designation of minimum maintenance roads. A road is not eligible for designation as a minimum maintenance road if federal highway aid to this state would be reduced as a result of that designation. A road is not eligible for that designation if additional right of way or easement by eminent domain is required for constructing of designating the road as a minimum maintenance road, unless the consent of the landowner is given or the designation is necessary for drainage or public safety.

32-12.1-03. Liability of political subdivisions - Limitations.

1. Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment of office under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use of tangible property, real or personal, under circumstances where the political subdivision, if a private person, would be liable to the claimant.
2. The liability of political subdivisions under this chapter is limited to a total of two hundred fifty thousand dollars per person and five hundred thousand dollars for injury to three or more persons during any single occurrence regardless of the number of political subdivisions, or employees of such political subdivisions, which are involved in that occurrence. A political subdivisions may not be held liable, or be ordered to indemnify an employee held liable, for punitive or exemplary damages.
3. A political subdivision is not liable for any claim based upon an act or omission of an employee of a political subdivision, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance, exercising due care, or the failure to exercise or perform a discretionary function or duty on the part of a political subdivision or its employees, whether or not the discretion involved be abused. Specifically, a political subdivision or an employee thereof is not liable for any claim that results from:
    a. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, charter, ordinance, order, regulation, resolution, or resolve.
    b. The decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.
    c. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.
    d. The failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities; or doing any fire extinguishment or fire prevention work, rescue, resuscitation, or

first aid; or any other official acts within the scope of official duties; provided, however, this subsection does not provide immunity for damages resulting from acts of gross negligence.

This subsection does not limit the liability of a political subdivision or an employee thereof for a personal injury arising out of the execution of any legislative or quasi-legislative act, judicial or quasi-judicial act, or discretionary function.

4. This chapter does not obligate political subdivisions for an amount that is more than the limitations upon liability imposed by this chapter. Subject to this chapter, any payments to persons constitute payment in full of any compromised claim or judgment or any final judgment under this chapter.
5. Notwithstanding this chapter, a political subdivision or its insurance carrier is not liable for any claim arising out of the conduct of a ridesharing arrangement, as defined in section 8-02-07.
6. A political subdivision is not liable for any claim based on an act or omission in the designation, repair, operation, or maintenance of a minimum maintenance road if that designation has been made in accordance with sections 24-07-35 through 24-07-37 and if the road has been maintained at a level to serve occasional and intermittent traffic.

APPENDIX B -
THE LAW IN NEIGHBORING STATES

The basic legal principles in this report apply to most states. However, the application of these principles differs, depending upon which state is being studied. The following is a list of cases which discuss the general legal principles of this report in the states of Minnesota, South Dakota, Montana, Wyoming, Utah, and Colorado. This list is intended merely as a starting point; it is a guide for the legal researcher who is beginning legal research about the tort liability of counties and townships with regard to closing or abandoning low-volume rural roads, or declaring such roads minimum maintenance. This list is not meant to be completely inclusive, but it is a good starting point.

Colorado

Hallam v. City of Colorado Springs, 914 P.2d 479 (Colo. App. 1995).
Fogg v. Macaluso, 892 P.2d 271 (Colo. 1995).
Lafitte v. State Highway Dept., 885 P.2d 338 (Colo. App. 1994).
Deneau v. State, 883 P.2d 567 (Colo. App. 1994).
Bertrand v. Board of County Comm'rs of Park County, 872 P.2d 223 (Colo. 1994).
Fogg v. Macaluso, 870 P.2d 525 (Colo. App. 1993).
State v. Moldovan, 842 P.2d 220 (Colo. 1992).
Jones v. City & County of Denver, 833 P.2d 870 (Colo. App. 1992).
Willer v. City of Thornton, 817 P.2d 514 (Colo. 1991).
Odenbaugh v. County of Weld, 809 P.2d 1059 (Colo. App. 1990).
Bloomer v. Board of County Comm'rs of Boulder County, 799 P.2d 942 (Colo. 1990).
Karr v. City & County of Denver, 677 P.2d 1384 (Colo. App. 1984).

Minnesota

Gutbrod v. County of Hennepin, 529 N.W.2d 720 (Minn. App. 1995).
Steinke v. City of Andover, 525 N.W.2d 173 (Minn. 1994).
Nusbaum v. Blue Earth County, 422 N.W.2d 713 (Minn. 1988).
Matter of Heirs of Jones, 419 N.W.2d 839 (Minn. App. 1988).
Holmquist v. State, 425 N.W.2d 230 (Minn. 1988).
Abbett v. St. Louis County, 424 N.W.2d 82 (Minn. App. 1988).
Seaton v. Scott County, 404 N.W.2d 396 (Minn. App. 1987).
Johnson v. Nicollet County, 387 N.W.2d 209 (Minn. App. 1986).
Edling v. Stanford Township, 381 N.W.2d 881 (Minn. App. 1986).
In re Maintenance of Road Areas Shown on Plat of Suburban Estates, 250 N.W.2d 827 (Minn. 1977).
VandenBroucke v. Lyon County, 222 N.W.2d 792 (Minn. 1974).

Montana
Hatch v. State Dept. of Highways, 887 P.2d 729 (Mont. 1994).
Yager v. Deane, 853 P.2d 1214 (Mont. 1993).
Knight v. City of Missoula, 827 P.2d 1270 (Mont. 1992).
Miller v. Fallon County, 783 P.2d 419 (Mont. 1989).
Brohman v. State, 749 P.2d 67 (Mont. 1988).
Townsend v. State, 738 P.2d 1274 (Mont. 1987).
Buck v. State, 723 P.2d 210 (Mont. 1986).
Workman v. McIntyre Constr. Co., 617 P.2d 1281 (Mont. 1980).
Helena Gun Club v. Lewis & Clark County, 379 P.2d 436 (Mont. 1963).
Childers v. U.S., 40 F.3d 973 (9th Cir.), cert. denied 115 S.Ct. 1821 (1995).

South Dakota
Bland v. Davison County, 507 N.W.2d 80 (S.D. 1993).
Zens v. Chicago, Milwaukee, St. Paul & Pacific R. Co, 479 N.W.2d 155 (S.D. 1991).
Wilson v. Hogan, 473 N.W.2d 492 (S.D. 1991).
Gulbranson v. Flandreau Township., 458 N.W.2d 361 (S.D. 1990).
Bryant v. Butte County, 457 N.W.2d 467 (S.D. 1990).
Tripp County v. Dept. of Transp., State of South Dakota, 429 N.W.2d 473 (S.D. 1988).
Zens v. Chicago, Milwaukee, St. Paul & Pacific R. Co, 386 N.W.2d 475 (S.D. 1986).
Kiel v. De Smet Township, 242 N.W.2d 153 (S.D. 1976).
Jensen v. Hutchinson County, 166 N.W.2d 827 (S.D. 1969).
Dohrman v. Lawrence County, 143 N.W.2d 865 (S.D. 1966).
Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945).

Utah
Keegan v. State, 896 P.2d 618 (Utah 1995).
Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp., 887 P.2d 848 (Utah 1994).
De Villiers v. Utah County, 882 P.2d 1161 (Utah 1994), cert. denied, 890 P.2d 1034 (Utah 1995).
Duncan v. Union Pacific R. Co., 842 P.2d 832 (Utah 1992).
Flynn v. U.S., 902 F.2d 1524 (10th Cir. 1990).

Wyoming
Harbel v. Wintermute, 883 P.2d 359 (Wyo. 1994).
Cranston v. Weston County Weed and Pest Bd., 826 P.2d 251 (Wyo. 1992).
Randolph v. Gilpatrick Constr. Co. Inc., 702 P.2d 142 (Wyo. 1985).
Oroz v. Board of County Comm'rs of Carbon County, 575 P.2d 1155 (Wyo. 1978).
McCormick v. Town of Thermopolis, 478 P.2d 67 (Wyo. 1970).
Fanning v. City of Laramie, 402 P.2d 460 (Wyo. 1965).
Nixon v. Edwards, 264 P.2d 287 (Wyo. 1953).
Smith v. U.S., 546 F.2d 872 (10th Cir. 1976).