



South Dakota Legislative Research Council

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SECTION LINE HUNTING: SOUTH DAKOTA TRADITION, SOUTH DAKOTA CONTROVERSY

Introduction. South Dakota offers some of the finest pheasant and goose hunting in the world, with hunters from all parts of the nation converging here during October and November to try their hand at the excellent hunting that is extolled in the outdoor press. They hunt on private land, public land, and on commercial hunting operations, and they funnel large amounts of money into South Dakota's economy. As pay-hunting grows more lucrative, with charges of \$75 to \$100 per day and higher, it becomes increasingly difficult for South Dakota hunters to find a place to hunt. For resident hunters who grew up with a rural hunting tradition and who may have been raised on farms themselves, or who are very likely only one generation removed from the farm, the prospect of not being able to hunt even though the game is plentiful can be extremely frustrating, especially when they know that a perfect hunting experience lies just across the fence--for the right amount of money.

On the other hand, it is easy to sympathize with those landowners who see themselves as overrun with hunters and hunting vehicles each year. Even dealing with courteous and law-abiding hunters can be stressful for landowners because of the sheer number of people who want to hunt. But when the problems caused by the minority of hunters who violate the trespass laws, who shoot too close to buildings and livestock, and who create traffic hazards on rural roads are added to the mix, landowners in the most heavily

hunted areas tend to view hunting season as a lengthy and unpleasant ordeal at best.

In this environment, the practice of hunting by the public in section line rights-of-way, more commonly known as road hunting, is bound to be controversial. (Note: In this paper, the terms "section line hunting" and "road hunting" are used interchangeably.) Although not all hunters engage in section line hunting, many do, and they feel that road hunting may be the only real opportunity for them to hunt with any chance of finding game, given the fact that much private land is closed to hunting and that many hunting areas open to the public are crowded and quickly hunted out. Opponents say that road hunting is not a sporting way to hunt and that road hunting is particularly susceptible to traffic and firearms safety hazards and trespass violations. Section line hunting has been the subject of two South Dakota Supreme Court decisions during the past year and was the subject of major legislative efforts during the 1996 Legislative Session, primarily to define section lines that are "unimproved" and thus closed to hunting.

Section Line Hunting Rules and Practices.

The four primary pheasant hunting states in the nation are South Dakota, Iowa, Nebraska, and Kansas, with South Dakota and Iowa having the largest numbers of birds. Section line hunting is not allowed in Kansas or Nebraska, but it is legal in South Dakota and Iowa (although shotguns in Iowa must be kept inside their cases while they are in motor vehicles). Although many other states also prohibit

section line hunting, pheasants are better suited than many game birds to road hunting, which makes broad comparisons with road hunting laws in other states less valid.

In South Dakota, hunting within section lines is open to the public, subject to the following rules:

- Firearms cannot be fired from vehicles on public highways and may not protrude from vehicle windows. The hunter must step outside the vehicle before shooting (SDCL 41-8-37 and ARSD 41:06:04:07).

- Firearms may not be discharged from public rights-of-way within 660 feet of livestock or occupied dwellings, churches, or schools (SDCL 41-9-1.1).

- Hunting without permission is not allowed on unimproved section lines that are not commonly used as public rights-of-way (SDCL 41-9-1.1 and 41-9-1.3).

- Big game may not be hunted from section lines (SDCL 41-9-1.2).

- A hunter may enter unarmed onto private land without permission in order to retrieve game legally taken from the section line or from other land on which he is authorized to hunt (SDCL 41-9-8).

Within these basic rules, two distinct types of section line hunting have developed: one method for pheasants and a very different method for geese.

Road hunting for pheasants involves driving slowly along gravel roads so that when a

rooster pheasant is spotted, the hunter stops the vehicle, gets out and attempts to get close enough to the bird to have an in-range shot when the bird flushes. Pheasants are quite wary and often flush before the road hunter is close enough for an effective shot, which sometimes causes hunters to attempt shots that are too long and result in crippled birds. The methods used for road hunting pheasants can also lead to safety hazards at times with vehicles cruising too slowly on gravel roads or excited hunters slamming on the brakes and leaving the vehicle in the middle of the road as they rush to get a shot at a rapidly disappearing bird. The prospect of bagging a rooster pheasant also causes violations of the 660 foot rule as hunters sometimes shoot too close to buildings and livestock. One road hunting method that significantly reduces safety risks is to park the vehicle before birds are sighted and walk ditches that seem to have good cover. This practice is approved by some landowners, although others do not want any hunters in the right-of-way.

The distinction between improved and unimproved section lines is not a major issue in pheasant road hunting, which mostly occurs on country roads that are obviously improved, although some hunters will attempt to drive on unimproved section lines. Most road hunters are conscientious and can hunt in a safe and reasonably sportsmanlike way. However, road hunters who abuse the rules can cause serious hazards and are especially disliked by landowners, who may have family members working in the yard or children playing in the trees by the road. They resent having to take special precautions during the hunting season to make sure that their families are safe. Unfortunately, for many South Dakotans road hunting is one of the few pheasant hunting opportunities left open to them, although some public hunting areas and “walk-in” areas in

some parts of the state can be productive.

Road hunting for geese is a much different issue and is concentrated primarily in areas along the Missouri River. In road hunting for geese, the hunter moves some distance away from his parked vehicle and may wait for a long period of time in a camouflaged position for geese that are flying to or from fields for feeding. Because the hunter's vehicle is already parked and the hunter is stationary as the birds approach, goose hunting from section lines involves very little in the way of safety hazards, except possibly in congested areas where large numbers of hunters have congregated. The issue in section line goose hunting lies in hunters using unimproved section lines that are closed to hunting and possibly other forms of trespassing on private property. Landowner-hunter problems in section line hunting for geese are more likely to involve commercial hunting as commercial operators object to having geese intercepted by people in the road ditch before they reach the commercial goose pits and the paying customers inside. The section line hunters respond that the geese belong to the public and that they have as much right as anyone else to hunt them. From the standpoint of hunting methods, section line hunting for geese is fairly similar to goose hunting in the field, with shots of similar difficulty and similar techniques used.

One problem in addressing section line hunting controversies is that hunting methods for pheasants and geese are so different that legislation aimed at one problem area has little effect in the other area, even though the distinction may not be clear to the general public. Finding the perfect definition of unimproved section lines does nothing to solve problems caused by pheasant hunters shooting too close to buildings, and finding a way to eliminate safety hazards caused by pheasant

road hunters has no effect on section line issues in the goose hunting arena.

The controversy surrounding road hunting evokes strong emotions, and quite possibly exaggeration, from both sides. While it is true that some road hunters create traffic hazards, some people argue that farm vehicles on gravel roads present some of the same hazards. Also, it is understandable that people may be fearful about firearms being discharged in the area, but it is important to note that shotguns used in pheasant hunting are much different than rifles used for big game hunting. Shotguns are devastating at close range, but quickly lose their power at longer ranges. For the average pheasant shooter and shotshell load, 40 yards is outside the effective range for pheasants and shots beyond that distance often produce crippled birds. Most pheasants are taken at less than 25 yards. The standard 12 gauge pheasant load will travel less than 300 yards horizontally before the pellets are completely spent and fall to the ground, and the ability to cause damage has dissipated much earlier. (Some rifle bullets can travel three miles and maintain their lethality for much of that distance.)

So, although safety hazards certainly are present with some road hunters, they should not be overstated. Most pheasant hunting accidents occur not with road hunting but with hunters in large parties using blocking methods and being hit by stray pellets by other hunters. Also, while many landowners have legitimate concerns about safety, trespassing, and the sheer inconvenience of having so many hunters in the area, there are a few who simply resent the presence of the public near their property and make it a point to make life for hunters less than pleasant.

Hunting and Private Property--History. In

South Dakota, hunting and trespassing issues involve a complex mix of legal questions, tradition, nostalgia, economics, practical issues of safety and privacy, questions on the nature of public and private property and resources, urban-rural tensions, and competing political philosophies. South Dakota law has always recognized wild game as the property of the state or public, not the private landowner (SDCL 41-1-2). While the public does not have a basic constitutional right to take that game, the courts have recognized the state's ability to pass laws to protect and manage wild game and to allow the public to take wild game. By the same token, although the state has long allowed landowners to prevent persons from hunting on their property, it has only been in the last twenty-five years that the statutes prohibited hunting on private property without permission of the landowner. In any event, the courts have recognized the state's authority to act on questions related to hunting on private property.

Questions on section line hunting are part of a larger category of issues dealing with hunting on private property. The law on trespassing in South Dakota falls into three general areas: civil trespass, the general criminal trespass law, and the hunting trespass law. Under civil trespass law, the landowner is entitled to recover damages caused to the property by a trespasser.

South Dakota's general criminal trespass law for rural areas (SDCL 22-35-6) only dates back to 1976 and makes it a Class 2 misdemeanor for a person to enter onto private property after having been told not to enter in one of three ways: being told verbally, posting notice on the property against trespassing, or construction of a fence that is obviously designed to keep intruders out (not necessarily a fence designed to keep livestock in). Defying

an order to leave personally communicated to the violator is a Class 1 misdemeanor. This statute applies to the general public and is less stringent than the trespass law for persons who are hunting, fishing, or trapping, although it is similar to South Dakota's old hunting trespass statute before it was revised in 1973. The general trespass law clearly implies that the public is allowed to enter onto private property without permission unless the owner has taken steps to keep intruders out.

South Dakota's current hunting trespass law (SDCL 41-9-1) is very clear. No person may hunt, fish, or trap on private property without permission from the landowner or lessee. SDCL 41-9-1.1 and 41-9-1.3 provide exceptions to this law for section line hunting; these exceptions are less clear and will be discussed later. As noted above, however, South Dakota's hunting trespass law was completely revised in 1973.

From the passage of South Dakota's first hunting and game law in 1899 until 1973, with minor adjustments made over the years, the basic principle was that hunters could enter and hunt on private land without permission, unless the land was enclosed by a woven wire fence, contained standing crops, or was within 40 rods (660 feet) of livestock, dwellings, schools, or churches, or unless the land was posted to provide notice that hunting was not permitted. These exceptions evolved over a number of years, but the basic principle was the same: most private land was open for public hunting unless the landowner took steps to prevent it. Under these circumstances, legal questions about hunting on section lines were less frequent, although road hunting was a common practice.

In 1973, South Dakota's private land hunting policy was reversed so that all private land was

closed unless the hunter took the initiative to obtain permission to hunt. As a compromise to the hunting public, the 1973 Legislature also adopted SDCL 41-9-1.1, which specifically retained public hunting, fishing, and trapping on all section line rights-of-way, including unimproved section lines, with the exception that section line hunting was not allowed within 660 feet of livestock or of occupied schools, churches or dwellings or along interstate highways and certain highways within park and recreation areas.

In 1981, hunting privileges were further restricted when SDCL 41-9-1.1 was amended to prohibit hunting, fishing, and trapping on “unimproved” section lines not commonly used as public rights-of-way. This new limitation on section line hunting led to additional disputes that continue today in one form or another.

Section Line Issues. Section lines originated with the Northwest Ordinances of 1787 as a way of surveying land in the newly created United States. Sections are square parcels of land one mile on each side, and section lines are the boundaries between sections. Thirty-six sections form a township. The Federal Highway Act of 1866 granted rights-of-way for the construction of highways on public lands that had not been reserved for other public uses, and the Dakota Territorial Legislature in 1870 used that authority to adopt what is now SDCL 31-18-1 to establish public rights-of-way along all section lines. At that time most of the land in the territory was public, and when private owners later purchased the land, the rights-of-way along section lines were already in place. The rights-of-way, which are sixty-six feet wide or thirty-three feet on either side of the section line, enabled future state and local governments to construct roads without the need to acquire rights-of-way by purchase or eminent domain. The section line rights-of-

way also serve to prevent large areas from being “land-locked” by ensuring the legal right to travel along the rights-of-way even if the landowner objects. South Dakota law does provide a procedure for legally “vacating” a section line right-of-way, so that the right-of-way and the public’s access to it no longer exist (SDCL Chapter 31-3).

In the eastern part of South Dakota, gravel roads have been constructed on most section lines. In the central and western parts of the state, however, the road system is much less complete; some section line roads are simply dirt trails, and many section lines have no roads or trails whatsoever and are indistinguishable from the surrounding countryside. The 1981 amendment to SDCL 41-9-1.1 was directed at this latter category of section lines, as landowners felt that hunters should not be allowed on these remote section lines because it is sometimes difficult to distinguish where the section line lies and because these section line right-of-way areas are no different functionally than the other private land adjacent to them. Interestingly, many of the complaints commonly leveled against road hunting--traffic hazards, shooting too close to buildings--do not apply to section lines that have no roads. For their part, landowners maintain that since they pay taxes on section line rights-of-way but receive no direct benefit for the taxes paid on unimproved section lines, it is not equitable for hunters to be able to penetrate deep into the landowner’s property by virtue of imaginary lines on a map without corresponding physical improvements to the land. On the other hand, these remote section lines remain open to public travel, and there is really no logical difference between the two, except that the statutes prohibit hunting on unimproved section lines but allow travel on them.

Since 1981, the Legislature has continued to

support its policy of distinguishing between improved and unimproved section lines for hunting purposes, even though it would be much simpler and much clearer to either open all section lines to hunting as they were before 1981 or to close all of them to hunting.

The 1981 amendment to SDCL 41-9-1.1 was not, and perhaps could not have been, written very clearly. The definition of unimproved section lines is extremely difficult to pin down given the wide variety of circumstances and terrain encountered. Specifically, the 1981 amendment provided that a section line right-of-way was closed to public hunting if it was not commonly used as a public right-of-way and if it was unimproved and had “never been altered from its natural state in any way for the purpose of facilitating vehicular passage.” If both of those conditions were met, hunting, fishing, and trapping along the section line without permission from the landowner were prohibited. If only one of the conditions was present, the section line was open. Litigation on the meaning of these provisions soon followed, and if the state’s policy is to continue to distinguish between improved and unimproved section lines, more disputes and litigation are to be expected.

Section Line Hunting Litigation. Since the 1981 amendment, SDCL 41-9-1.1 and section line hunting have been the subject of three South Dakota Supreme Court decisions, two of which addressed the definition of unimproved section lines and one that addressed the basic issue of whether public hunting on section line rights-of-way is permissible at all.

In the most recent decision, *Reis v. Miller*, issued in the summer on 1996, the court ruled that the state’s granting of public hunting privileges along section line rights-of-way is a

legitimate exercise of the state’s authority. The court held that even though the Federal Highway Act of 1866 and the 1870 territorial legislation creating section lines referred to transportation without mentioning other acceptable public uses of section line rights-of-way, those pieces of legislation did not intend to restrict all other uses of the rights-of-way not directly related to transportation. The court ruled further that the Legislature and the courts have recognized the right to use public highways for recreational purposes since the 1880s and that it is within the purview of the Legislature to allow and to regulate hunting in section line rights-of-way.

The other two cases dealt more specifically with the kinds of section lines that may be closed to public hunting. In 1983, two years after unimproved section lines were removed from public hunting, the court in the case of *State v. Peters* overturned the conviction of a person for hunting in a remote and apparently unimproved section line. In the *Peters* case, the court ruled that section lines were improved and thus open to public hunting if they had been altered in any way for the facilitation of vehicular passage. The court held that any alteration, such as the presence of tire tracks or the possible removal of rocks, was sufficient to classify a section line as improved and open to public hunting.

This broad definition of improved section lines was in place until the fall of 1995 when the court adjusted its definition of improved and unimproved section lines in the case of *State v. Tracy*. In the *Tracy* case, the court overturned the conviction of a person for harassment of hunters who were hunting in a section line that the court determined to be unimproved and therefore closed to public hunting. In the *Tracy* case the court narrowed its definition of improved section lines by stating that the

improvement must be “an intentional enhancement of the natural terrain’s utility for travel or an adaptation which will permit travel where it was not previously possible.” The court also mentioned some examples of improvements, such as grading, widening, graveling, and so on, without stating any specific improvements that must be present in order to qualify as an improved section line.

The *Tracy* case definitely reduced the number of section lines that could be considered as improved and open for hunting, but it did not provide a clear guideline for hunters or landowners in determining whether a particular section line was open or closed. The new ruling led some landowners to plow up vehicle tracks on section lines so that they would not appear to be improved and would not be accessible to hunters.

One consideration that has not received much attention is that while both the *Peters* and *Tracy* rulings discussed improved and unimproved section lines at length, neither of them discussed the other condition in SDCL 41-9-1.1 necessary for closing a section line: that the section not be commonly used as a public right-of-way. On flat terrain, it is very possible that a section line could be commonly used for hunting and other purposes resulting in distinct and well-worn vehicle tracks, without the need for additional physical improvements of the type discussed in the *Tracy* case. There are many section lines in the state that fit this description, but it is not clear that plowing them up would be a legal way of making them meet the criteria of the *Tracy* case. The court has not defined what constitutes common use by the public. At any rate, the *Tracy* case created a great deal of public and private consternation and led to calls for solutions by the 1996 Legislature.

Section Line Hunting Legislation--1996.

The reaction to the *Tracy* case resulted in the introduction of two major bills in the 1996 Legislative Session that addressed section line hunting. HB 1195 attempted to solve some of the safety problems associated with road hunting for pheasants by requiring that vehicles be parked off the maintained portion of the road with the doors closed and that the hunter be at least 50 yards away from the vehicle before discharging a firearm. Hunters’ groups objected that these restrictions would make it considerably more difficult to take pheasants and HB 1195 was defeated in committee.

HB 1169 addressed the issue of unimproved section lines and in its original form would simply have opened all section lines to public hunting, fishing, and trapping as they had been before 1981. However, HB 1169 generated a large amount of public discussion and media attention and went through a long series of amendments and counter-amendments before it was finally passed by the Legislature and signed by the Governor. In its final form, HB 1169 amended SDCL 41-9-1.1 to increase the penalties for hunting too close to buildings and livestock and to refine the definition of unimproved section lines, with the section line definition question taking up most of the discussion.

The final version of HB 1169, using language from the *Tracy* Supreme Court decision, continued to list two conditions for determining whether a section line is unimproved and thus closed to public hunting, fishing, and trapping. Under HB 1169, a section line is open if:

“(1) The right-of-way has been commonly used by the public for vehicular travel, as demonstrated by the existence

of a well-worn vehicle trail; or

(2) An intentional alteration or adaptation has been made to the right-of-way to enhance the natural terrain's utility for vehicular travel or to permit vehicular travel where it was not previously possible.”

The amendments attempted to find middle ground between the *Peters* and *Tracy* decisions by providing more specific criteria for determining whether a right-of-way has been commonly traveled and by using more specific language to describe an improvement to a right-of-way. Although the previous law was written in the negative, and the new law is written positively, the effects are similar; if a section line is not commonly used and has not been improved, it is closed to public hunting, fishing, and trapping. Although some observers disagree about the possible impacts of the new law, its practical effect probably lies somewhere between the *Peters* and *Tracy* decisions.

The debate surrounding HB 1169 also reaffirmed the Legislature's desire to allow section line hunting but to somehow distinguish between unimproved, unused section lines, which are to be closed, and improved or commonly traveled section lines, which are to be open. The new law is probably an improvement over the old one; but as noted above, under this policy choice it remains difficult to clearly define the kinds of section lines that will be open or closed and it remains

likely that more disputes will occur. The Legislature is aware of this possibility, but it is an outcome that the Legislature considers preferable to the alternatives of opening all section lines or closing them all.

Summary. Disputes in which both sides see themselves as injured are difficult to resolve, and the section line hunting issue falls into this category. Hunters have seen their hunting rights and privileges severely eroded, in both legal and practical terms, over the past twenty-five years and are determined to prevent further losses. Landowners feel that they are outvoted in the Legislature and have no real hope of having their hunting grievances addressed. A few people in both camps tend to exacerbate the situation and make compromise more difficult to achieve.

Speculating about the intent of the 1866 Congress or about how people traveled or recreated in the Nineteenth Century does little to solve current practical issues. In 1899 when South Dakota's first hunting and game law was passed, the state was overwhelmingly rural, there were few roads and fewer motor vehicles, there were no pheasants, and the person hunting on private land was probably a neighbor. Obviously, the situation is much different today, and neither landowners nor hunters can make things the way they used to be or are perceived to have been. What is clear is that the controversy about hunting will continue, and the courts have consistently held that the Legislature is the appropriate entity to address this issue.

This issue memorandum was written by Tom Magedanz, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
