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Highways, Hunters, and Section Lines: Tension Between Public Access and Private Rights

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HIGHWAYS, HUNTERS AND SECTION LINES: TENSIONS BETWEEN PUBLIC ACCESS AND PRIVATE RIGHTS

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In South Dakota, the public has been granted access along all section lines in the state. Furthermore, the public right to hunt along these easements attaches to improved or commonly traversed section lines. As commercial hunting has become more prevalent, disagreements between hunting and landowning interests have come to the fore. The South Dakota Legislature and Supreme Court have reacted to these controversies in a rather unpredictable fashion, reflecting the tug-of-war between public and private interests in these statutory right-of-ways.

I. INTRODUCTION

The power to exclude others has been called one of the most treasured strands in the bundle of rights that make up real property.[1] Property law has long protected landowners' expectations that their possessory interests will be relatively undisturbed, and property owners suffer a special injury when strangers invade their land.[2] Ownership of property includes the right to protect and defend against intrusion or trespass by others onto one's land.[3] The right to exclude is not an absolute right, however.[4] A landowner's property rights can be restricted by the state in the exercise of the police power or of eminent domain.[5] Property owners' rights are also subject to certain burdens which must be borne in common with other simi-

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1. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434, 102 S.Ct. 3164, 3176 (1982). The right to use is another important right incident to ownership. John Wanamaker, Philadelphia v. School Dist., 274 A.2d 524 (Pa. 1971).

2. *Loretto*, at 458 U.S. at 436, 102 S.Ct. at 3176.

3. *See* Green v. Biddle, 21 U.S. 1, 75-76, 8 Wheat. 1, 75-76 (1823) (stating that a law which denies a landowner a remedy to recovery the possession of his land impairs his right to the property); Zabowski v. Loerch, 237 N.W. 386, 387 (Mich. 1931); Bunten v. Davis, 133 A. 16 (N.H. 1926) (involving the rule that one has a right to reasonably defend one's property against invasion). *See also* Cross v. State, 370 P.2d 371 (Wyo. 1962) (reversing conviction for shooting an out-of-season moose which had become entangled in a fence, torn down a considerable portion, and had previously consumed pasture, excited livestock and offended both domestic animals and humans with the stench of moose offal, especially the urine). The right to protect one's property being a Constitutional one in Wyoming, the legislature may not prohibit a person from killing an animal when necessary to prevent the degradation of his property. *Id.* at 378.

4. *See, e.g.*, State v. Shack, 277 A.2d 369 (N.J. 1971) (holding that the ownership of real property does not include the right to bar access to government services available to migrant workers).

5. *See, e.g.*, Hopkins v. United States, 173 F.Supp. 245 (D. Tex. 1959) (property owners entitled to compensation for government's exercise of eminent domain in easement of flight in airspace for air force base); Appeal of Culp, 522 A.2d 1176 (Pa. Commw. Ct. 1987) (holding that a county's regulation of an operator's use of a mobile home park is an appropriate exercise of police powers).

larly situated property.[6] For example, an owner of riparian lands has rights in riparian waters, but subject to the rights of other riparian landowners and the public.[7]

A limitation upon the right to exclude which must be borne in other property of a like kind is also found in the public's right-of-way and highway rights.[8] In South Dakota, the public has a right of access along all section lines in the state.[9] In effect, the state's landowners have their lands criss-crossed by designated "highways" once every mile.[10] This is so, even if no road or trail has ever been laid, or even contemplated.[11] From these highways, individual landowners hold no power to obstruct or interfere with the public's right to travel.[12] Furthermore, the public holds a right to travel a number of these section lines for the purposes of hunting, though currently the section lines must meet certain requirements before the right attaches.[13]

The right of the public to hunt along these right-of-ways in South Dakota forms the subject of this comment. A short history of property and hunting law, and of the federal statute which originally granted the right-of-

6. 63C AM.JUR.2D § 33 *Property* (1997).

7. *See* Parker v. Griswold, 17 Conn. 288, 299-300 (1845) (stating that neither neighboring landowner may prevent water from flowing over the land of the other); Kennebunk, Kennebunkport & Wells Water Dist. v. Marine Turnpike Authority, 84 A.2d 433, 437 (Me. 1951) (stating the rule that a riparian propretier may not make a diversion of water for non-riparian use); Hume v. Rogue River Packing Co., 92 P. 1065, 1073, *rehearing denied* 96 P. 865 (Or. 1907) (stating that the owner of tide lands bordering river has no exclusive right to fish the waters because that right belongs to the public); State *ex rel.* Wausau Street R. Co. v. Bancroft, 134 N.W. 330, 340 (Wis. 1912) (noting that the right of a riparian owner to use the water of a navigable stream on his land to create power is a private right but must be exercised in subordination to the public rights of navigation). *See also* RESTATEMENT (SECOND) OF TORTS § 193 (1965) (stating the general rule that one is "privileged to navigate in a reasonable manner navigable waters situated on land in the possession of another").

8. *See* Escobedo v. State Dept. of Motor Vehicles, 222 P.2d 1, 5 (Cal. 1950) (stating that the use of highways is not a mere privilege, but a common and fundamental right); McClintock v. Richlands Brick Corp., 145 S.E. 425, 431 (Va. 1928) (holding that the public right to use streets legitimately for transporting property is as secure and inviolate as the private rights of an abutting owner); Blumenthal v. Cheyenne, 186 P.2d 556, 571 (Wyo. 1947) (stating that abutting property owners have no greater rights to the street than the public generally, except for ingress and egress and certain other analogous rights).

9. S.D.C.L. § 31-18-1 (1984).

10. A "section" is one square mile, or 640 acres; "townships," which are six miles square, are divided into thirty-six sections. BLACK'S LAW DICTIONARY 1214 (5th ed. 1979). Statutory section line highways in South Dakota are sixty-six feet wide, thirty-three feet on each side of the section line. S.D.C.L. § 31-18-2 (1984). Thus the overall width of the highway is equal to one "chain," defined as a lineal land measure of sixty-six feet. BLACK'S LAW DICTIONARY 208 (5th ed. 1979). On each side of the section line, the highway extends two "rods" or "perches," defined as sixteen and a half feet. *Id.* at 1194.

11. Lawrence v. Ewert, 114 N.W. 709 (S.D. 1908). "[S]ection lines . . . should be open to the use of the public, and no action of boards of county commissioners or supervisors of townships is required to establish or open such highways. . . ." *Id.* at 710.

12. *See* S.D.C.L. § 31-25-1 (1984) (directing county commissioners to require the erection of gates or grates for public access to the section line highways when landowners have been authorized to erect fences across the highways); S.D.C.L. § 31-25-1.1 (1984) (providing that landowners must erect and maintain unlocked gates that are easily opened when they erect fences across unimproved section line highways); *Lawrence*, 114 N.W. at 711 (issuing injunction to remove obstructions placed to close up section line highways).

13. S.D.C.L. § 41-9-1.3 (Supp. 1997). Specifically, the section line must be either commonly used by the public or intentionally altered to enhance vehicular travel. *Id.*

ways which have become South Dakota's section line easements precedes an examination of how this grant has been interpreted. After a description of the various hunting techniques employed for taking game birds along section lines, the comment sets forth the ability of both governments and private landowners to restrict and even prohibit hunting activities. The next section deals with contemporary controversies surrounding the right to hunt along section line easements in South Dakota, and how recent legislative definitions of the right based upon the condition of the section line in question have proved unworkable. The comment concludes with an analysis of these controversies and concludes that recent attempts to reach a compromise between landowning and hunting interests has frustrated both, and satisfied neither.

II. BACKGROUND

While the topic of this essay is specifically limited to hunting rights upon section line right-of-ways in South Dakota, most of what follows would apply with equal force to activities directly related to hunting such as scouting for game, or to similar pursuits, such as fishing or trapping. For stylistic and space considerations, however, these activities will be referred to under the heading of "hunting." The term "highways" as used within this essay includes not only roads or paths, but also, more generally, ways which are open to public use as a matter of right.[14]

A. PRE-STATEHOOD PROPERTY AND HUNTING LAW

Prior to European settlement, North American Indian tribes protected wildlife stocks by restricting the time and methods of harvest, and by enforcing the rights to certain hunting territories.[15] The ideal climate, soil and nutritional opportunities of the continent, combined with a small population of hunters, caused game to flourish.[16] As whites introduced agriculture and industry, however, Native Americans found it difficult or impossible to enforce their property rights and wildlife populations plummeted.[17]

English common law forms the historical antecedent for much American law, but American and English law grew to differ sharply as pertaining to wildlife.[18] In the American colonies, the government often allowed the

14. Webster's Third New International Dictionary, 1069 (1986).

15. Dean Lueck, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 NAT. RESOURCES J. 625, 630 (1995) [hereinafter Lueck].

16. JAMES B. WHISKER, THE RIGHT TO HUNT 11 (1991) [hereinafter WHISKER]. "Only rarely in recorded history, or even in recent pre-history, has game been found in significant quantities. North America stands out as the great exception." *Id.*

17. Lueck, *supra* note 15, at 630. When Europeans brought the plow that broke the plains, the axe that denuded the forest, and technology to kill in great numbers, the natural habitat was destroyed. WHISKER, *supra* note 16, at 11. "When the Europeans arrived it was estimated that ten million elk lived in what is now the United States. Elk herds now number about 100,000." *Id.* at 81.

18. Lueck, *supra* note 15, at 630. Under English law, landowners had important rights to

public to use private land for certain purposes, such as hunting or fishing.[19] One commentator has even described colonial era property ownership as a right of stewardship for both private and public benefit, rather than an absolute right.[20] In that era, private land was sometimes taken for highways or other public uses without compensation.[21] In other words, American property law has frequently seen public rights and needs dictating the definition of private land ownership, oftentimes reflected in the suspension of the landowners' rights to exclude members of the public.

B. U.S. REVISED STATUTE 2477

"The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[22] So reads the federal act which has become known simply as R.S. 2477.[23] R.S. 2477 was a congres-

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game on their property through the doctrine of "*ferae naturae, ratione soli.*" *Id.* at 631. Parliament restricted access to wildlife further with the Qualification Acts (Game Laws) from 1369 to 1831 whereby individuals could not even take game on their own land without owning minimum amounts of land or wealth. *Id.* In American law, the right of property in game is common to all people and cannot be claimed by particular individuals. 35 Am. Jur. 2d, *Fish and Game* § 1 (1967). However, a landowner does have a qualified property interest in game upon her land in that in most states no one may enter upon her land to hunt without her permission, and the landowner has an unqualified right to control and protect the game on her lands, subject to any regulations the state imposes. *Id.*

19. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1272 (1996) [hereinafter Hart]. For example, Hart cites a Plymouth colony law which stated that "fishing fowling hawking hunting be freely provided if any damage come to any [par]ticular [person] by the prosecu[tion] of such game[,] restitu[tion] be made or the case actionable." *Id.*, *citing* Act of Nov. 15, 1636, 11 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 6, 16 (David Pulsifer, ed., 1861). Virginia granted the public rights to hunt on private land which was "not planted or seated though taken up." HART, at 1272, *citing* Act LXXI of Mar. 23, 1661[-2], 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 96 (William W. Hening, ed., 1823). *See also*, David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 466 (1993) (stating that from 1776-1800, property rights on the rhetorical level were described in "absolutist" terms, while in fact property was subject to significant regulation).

20. BARRY A. SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 183 (1994). The landowner's right to utilize and control land "remained subject to an obligation to further important community objectives." Hart, *supra* note 19, at 1281.

21. Hart, *supra* note 19, at 1283.

22. 43 U.S.C. § 932 (1938) (originally enacted as Act of July 26, 1866, ch. 262 § 8, 14 Stat. 251, 253 (1868), and reenacted as Revised Statutes 2477 (1873)), *repealed by* Federal Land Policy Management Act of 1976, § 706(a), 90 Stat. 2744, 2793 (1976). Rights-of-way which were granted before the Federal Land Policy and Management Act was enacted were preserved. Pub. L. 94-579, § 701, *later codified at* 43 U.S.C. § 1701 (1994). The term "public lands" designates unreserved federal lands which are open to the public for sale or other disposal. Leroy K. Latta, Jr., *Public Access Over Alaska Public Lands As Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811, 829 (1988) [hereinafter Latta].

> The thirty public land states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

Id. at 813 n.11, *citing* 170 PUBLIC LAND STATISTICS 114 (Apr. 1986). The words "not reserved for public uses" excludes lands such as wildlife refuges, national parks, and military reservations from the grant. *Id.* at 829-830.

23. *See generally*, Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 PACE ENVTL. L. REV. 485 (1994) (proposing uniform standards for adjudicated

sional grant to the states which is steeped in uncertainty; it has no definitions, virtually no legislative history, and construing the statute has been left largely to the states, with predictably varied interpretations.[24] Environmental groups have expressed concern at liberal readings of the grant, while proponents of expanding access to federal lands view R.S. 2477 as a mechanism to circumvent land use law and authorize the expansion of footpaths and animal trails into highways.[25]

In the 19th century as settlers pushed the frontier further and further westward, large scale trespass on federal lands became inevitable.[26] The vast western holdings of the federal government held untold riches and roads were quickly evolving as homesteaders and miners created ways of access to their mines and farms.[27] The Congress at once understood that it could not as a practical matter administer these countless roads.[28] In response to this situation, R.S. 2477 legitimized the roads and paths made by American settlers and codified a system for future access, while leaving the states the discretion to develop these access routes.[29]

Perhaps R.S. 2477 can be best understood as a contract between the 39th Congress and the states.[30] As a unilateral contract, conforming performance by the offeree would constitute acceptance even without formal

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scope of R.S. 2477 grants), Barbara G. Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 301 (1994) (arguing against regulations which would restrict existing R.S. 2477 rights), R. Blain Andrus, *Access to Private and Public Lands Under R.S. 2477*, NEVADA LAW., June 1993, at 10-14 (advocating legislation to determine scope of existing R.S. 2477 rights). This section is also known as the 1866 Lode Mining Act, Federal Highway Grant Act, Highway Grant Act, Highway Act of 1866, Right-of-Way Act—Highways, Right-of-Way of Canal Owners, and the Legislation as to Drainage. Latta, *supra* note 22, at 811 n.3.

24. Michael J. Wolter, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 DICK. J. ENVTL. L. & POL'Y 315, 319 (1996) [hereinafter Wolter]. *See* Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988), *overruled on other grounds in* Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992) (stating there is no legislative history to R.S. 2477, and the legislative context sheds little light). "... R.S. 2477 has been largely, and inconsistently, construed in light of a crazy quilt of state law." Wolter, *supra* at 321. "R.S. 2477 is not evil. R.S. 2477 is misunderstood, archaic, and unpredictable." *Id.* at 326.

25. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (1994), *to be codified at* 43 C.F.R. § 39. *See also* Bader, *supra* note 23, at 486 (stating that "R.S. 2477 has the potential to thwart effective management of much of the country's national parklands, designated wildlife areas, and wildlife refuges"). In grander terms, Bader countinues: "Despite its deceptively simple language, [R.S. 2477] invokes the imbroglio between state sovereignty and federal supremacy which has plagued American federalism since the founding of the Republic." *Id.*

26. Central Pac. Ry. v. Alameda County, 284 U.S. 463, 469-472 (1931).

27. *Id.* at 489.

28. *Id.*

29. *Id.* at 486. By formalizing and solidifying frontier access routes, Congress validated the frontier self-help development policy. United States v. 9,947.72 Acres of Land, 220 F.Supp. 328, 331 (D. Nev. 1963).

30. Letter from Frederick N. Ferguson, Deputy Solicitor, Department of the Interior, to Hon. James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, Department of Justice 13 n.4 (Apr. 28, 1980), *reprinted in* UNITED STATES DEPARTMENT OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS app. II, exhibit J (1993) [hereinafter Ferguson].

words of acceptance.[31] With this analogy, then, the statute itself forms the offer, which is defined by federal law.[32] The acceptance, meanwhile, must be valid under the law of the state in which it occurred.[33] Use of this analogy should not suggest any actual contract between the federal government and the states, however.[34]

The analyses that states have developed for determining whether there has been a valid acceptance of the R.S. 2477 grant of right-of-ways can be grouped into three categories.[35] Arizona requires a formal government resolution following actual construction to constitute acceptance.[36] Other states require acceptance by a public user, but do not require actual construction or maintenance.[37] Still other states, South Dakota included, hold that simply designating all section lines as public highways is sufficient to accept the grant.[38]

State law, it is generally agreed, defines the terms of an acceptance of the R.S. 2477 grant, yet the unilateral contract analogy would suggest that states cannot accept more than was offered, nor broaden the means of acceptance defined by the 39th Congress. It is arguable whether designating a state's section lines as highways is consistent with the R.S. 2477 offer which implies the necessity of "construction of highways" to perfect the

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31. Wolter, *surpa* note 24, at 326, *citing* Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (C.A. 1892).

32. 59 Fed. Reg. 39,218 (1994). The Property Clause confers the federal government power over public lands, and forms the basis for Congress' authority to make the offer. Wolter, *supra* note 24, at 327; U.S. CONST. art. IV, § 3, cl. 2.

33. *See* 59 Fed. Reg. 39,218 (1994) (stating that "claimants are also required to comply with State law, which therefore may further condition the acceptance of a right-of-way"). States may restrict their acceptance of the grant, but may not broaden the means of acceptance beyond what Congress offered, or accept pursuant to state laws which fail to satisfy the requirements of the statute. Wolter, *supra* note 24, at 328.

34. WOLTER, *supra* note 24, at 326. Wolter writes:

> If made to carry more than it can bear, the analogy might collapse under such weighty issues as whether R.S. 2477 was an offer or merely an advertisement, whether the performing party need be aware of the offer, whether the statute of frauds applies, and, if so, whether it has been complied with, or whether notice of performance was required.

Id. at 327.

35. FERGUSON, *supra* note 30, at 9.

36. ARIZ. REV. STAT. ANN. § 28-1861 (1989 & Supp. 1995), *repealed by* ARIZ. REV. STAT. ANN. § 28-7041 (1995); Ruscon Consol. Copper Co. v. Reese, 100 P. 777, 778 (Ariz. 1900). Only Arizona's means of acceptance meets the element of "construction." WOLTER, *supra* note 24, at 322 n.32. *See also* Moulton v. Irish, 218 P. 1053, 1054 (Mont. 1023) (stating that R.S. 2477 only becomes operative upon the construction of a public highway).

37. COLO. REV. STAT. § 43-2-201 (1993), Nicolas v. Grassle, 267 P. 196, 197 (Colo. 1928); N.M. STAT. ANN. § 67-2-1 (1978 & Supp. 1996), Wilson v. Williams, 87 P.2d 683, 685 (N.M. 1939); OR. REV. STAT. § 368.131 (1993), Montgomery v. Somers, 90 P. 674 (Or. 1907); UTAH CODE ANN. §§ 27-12-26, 27-12-89, 27-15-3, 27-16-105, 27-16-102(3)(b) (1995 and Supp. 1995); WYO. STAT. § 24-1-101 (1993), Hatch Bros. Co. v. Black, 165 P. 518, 520 (Wyo. 1917). *See also*, Streeter v. Stahnaker, 85 N.W. 47 (Neb. 1901) (finding acceptance in continued public use plus assumption of control over road by public authorities).

38. ALASKA STAT. §§ 19.10.010, 19.10.015 (1988 & Supp. 1995), Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska 1975); KAN. STAT. ANN. § 68-101 to 68-106 (1992 & Supp. 1994), Tholl v. Koles, 70 P.2d 881, 883 (Kan. 1902); Small v. Burleigh City, 225 N.W.2d 295 (N.D. 1974), *appeal after remand*, 239 N.W.2d 823 (N.D. 1976) (construing the same 1871 territorial legislation as South Dakota); S.D.C.L. § 31-18-1 to 31-18-4 (1984 & Supp. 1997), Wells v. Pennington County, 48 N.W. 305, 308 (S.D. 1891).

grant.[39] Much recent discussion on this question has occurred in Alaska and Utah, both of which contain sizable federal holdings.[40] In South Dakota, the legislative designation of section line right-of-ways could be seen as falling short of "construction." Moreover, a mere statutory enactment might not comply with the necessity of "highways."[41] Nevertheless, South Dakota's designated section line highways have been authoritively declared as an effective acceptance of the R.S. 2477 offer.[42]

C. Section Lines in South Dakota

The seminal case interpreting section line access rights in South Dakota as granted by R.S. 2477 and accepted by the Dakota territorial legisla-

39. *See* Board of County Commissioners of Douglas County, Washington, 26 Pub. Lands Dec. 446, 447 (1898) (containing a conclusion by the Secretary of the Interior that a designation of all section lines in a county as center or side lines of R.S. 2477 highways was ineffective to accept the offer of right-of-ways before road were constructed, planned, or even needed). The question of whether a state's performance was sufficient acceptance of the grant turns largely on the degree to which state law defines the terms of the acceptance and some argue that state law alone cannot define the manner of establishment. Wolter, *supra* note 24, at 329-331. *Sierra Club v. Hodel* states in dicta that the Ferguson letter, *supra* note 30, supports the proposition that as a matter of federal law, *state* law controls the acceptance of the grant. *Sierra Club v. Hodel,* 848 F.2d at 1080-1081. *See also* Catherine L. Butcher, Note, *Not Just Another Federal Pre-Emption Case,* 30 Nat. Resources J. 217 (1990) (arguing that the *Hodel* decision insures management of public lands with R.S. 2477 roads will be inefficient and problematic). However, Pamela Baldwin has argued that *Hodel* misread the Ferguson letter, and that the court's conclusion was made in the context of the grant's scope, not the acceptance issue. Pamela Baldwin, Cong. Rev. Serv., CRS Report for Congress No. 93-74A, Highway Rights-of-Way: The Controversy Over Claims Under R.S. 2477 24-25 (1993).

40. D.J. Baxter, *A Brief Introduction to R.S. 2477 Rights-of-Way,* 14 J. Energy, Nat. Resources, & Envtl. L. 295 (1994). *See also* Stephen P. Quarles & Thomas R. Lundquist, *The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands,* 4 Alaska L. Rev. 1 (1987); Joel A. Ferre, Note, *Schultz v. Department of Army: Seasonal Use of a Trail with Definite Termini Sufficient to Establish an R.S. 2477 Right-of-Way in Alaska,* 15 J. Energy, Nat. Resources & Envtl. L. 100 (1995).

41. *See* Wolter, *supra* note 24, at 331-340 (defining "construction" to mean intentional physical acts which combine to produce a surface which will support highway traffic but finding the definition of "highway" within the Act to be indeterminative). Wolter concludes:

> [W]hen one evaluates the word "highways" in the company of its creative, building, and purposeful friend "construction," one comes away with an understanding of a "highway as being a great or public road, one which construction has raised to form a dry path.

Thus, R.S. 2477 is an offer of land for a particular purpose. That purpose is the building of major public roads. No lesser measure of performance can effect acceptance of the grant. *Id.* at 340. *Contrast* Harris v. Hanson, 75 F.Supp. 481, 482 (D. Idaho 1948) (stating that highways are roads, streets, or alleys which are laid out or dedicated to the public) *with* Karb v. City of Bellingham, 377 P.2d 984, 986 (Wash. 1963) (defining a highway is a way open to the public at large) *and* Paterson & Ramado Ry. Co. v. Mayor and Aldermen of City of Patterson, 86 A. 68, 69-70 (N.J. Ch. 1912) (holding that construction implies the performance of work, not just the mere delineation of) *with* Central Pacific Ry. Co. v. Alameda Co., 284 U.S. 463, 465, 467 (1932) (implying that R.S. 2477 may be created by use since original road in question was formed by the passage of wagons over natural soil). A proposed rule addressing R.S. 2477 rights-of-way across land administred by the Bureau of Land Management, the National Park Service and the U.S. Fish and Wildlife Service would require intentional physical acts that were intended to and did accomplish the preparation of "a durable, observable, physical modification of land for use" by vehicles. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (1994) (to be codified at 43 C.F.R. 39).

42. See *infra* notes 38 and 43 for a discussion of the *Wells* case. *But see* Wolter, *supra* note 24, at 831 (stating: "A construction requirement would invalidate the state (and territorial) government's establishment by statute of section line rights-of-way").

ture is *Wells v. Pennington County*.[43] In that case, Wells had made an unsuccessful claim for damages from the Pennington Board of County Commissioners after a county road supervisor had appropriated Wells' land along a section line for a public highway.[44] After the board rejected his claim, he prevailed before a jury, and the county appealed.[45]

Wells contended that the Congressional grant in R.S. 2477 was not an absolute grant, but in the nature of a general offer which would only become operative when its terms were complied with by municipalities having the authority to construct public highways.[46] Because the Dakota Territory had lacked such authority, Wells concluded, only such public highways as had been constructed prior to the patent of the land were taken for public highways.[47] The South Dakota Supreme Court disagreed, finding R.S. 2477 to be a grant *in praesenti* so that easements had attached upon territorial acceptance, and had been perfected as soon as the land was surveyed, section lines were designated, and the land was capable of identification.[48] Since the earliest date Wells presumably could have obtained a certificate of entry to his land was a nearly a year after the official plat had been filed, he had taken the land subject to a public highway along the section lines.[49] A string of cases follow *Wells* which further interpret the scope and parameters of these public highway easements, but continue to hold the territorial designation of section line highways a sufficient acceptance of the R.S. 2477 grant.[50]

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43. *Wells*, 48 N.W. 305.

44. *Id.* at 305. As the county had taken Wells' private property for a public use, he claimed damages in the sum of $400. *Id.*

45. *Id.* A jury awarded Wells $275. *Id.*

46. *Id.* at 306.

47. *Id.* at 306, 307.

48. *Id.* at 307, *citing* Wisconsin Cent. R. Co. v. Price Co., 133 U.S. 496, 10 S.Ct. 341 (1890). The Congressional Act and Territorial law are notice to all persons subsequently filing on public lands that they take subject to the right-of-way for highway purposes. *Wells*, 48 N.W. at 307.

49. *Id.* at 308. "The territorial law located the highways upon all public lands upon the section lines, and this public grant or dedication was so accepted, and became valid as against the government, and therefore valid as against its subsequent grantee, who must take the land subject to this right." *Id.*

50. *See* K & E Land and Cattle, Inc. v. Mayer, 330 N.W.2d 529 (S.D. 1983) (holding that adjoining landowner has no right to destroy fence wrongfully set up by neighbor on section line right-of-way without following proper statutory procedures); Thormodsgard v. Wayne Township Board of Supervisors, 310 N.W.2d 157 (S.D. 1980) (allowing landowner's action to compel township to open untravelled, but unabandoned section line highway); Dave Gustafson & Co. v. State, 169 N.W.2d 722 (S.D. 1969) (defining section line highways as "public highways" for the purpose of use fuel taxes); Costain v. Turner County, 36 N.W.2d 382 (S.D. 1949) (following *Pederson* in failing to find an abandonment of a highway easement in a resolution by a board of county commissioners); Pederson v. Canton Township, 34 N.W.2d 172 (S.D. 1948) (determining that abandonment of a section line right-of-way cannot be established solely by evidence that the highway has never been opened, improved, or traveled); Kreider v. Yarosh, 217 N.W. 640 (S.D. 1928) (involving the moving of a section line highway to a true government section line); State v. Bovine, 170 N.W. 138 (S.D. 1918) (involving a criminal trespass action brought when telephone company employees clearing timber for telephone line departed from section line); Sample v. Harter, 156 N.W. 1016 (S.D. 1916 (finding section line public highways exist even when they lead only to a lake); Lowe v. East Sioux Falls Quarry Co., 126 N.W. 609 (S.D. 1910) (holding that a blacksmith shop may not place obstructions in an unabandoned section line highway which is impassable, but potentially practical as a highway); Lawrence v. Ewert, 114 N.W. 709 (S.D. 1908) (interpreting the statutory procedures for establishing highways on section lines as permissive

D. Hunting: Techniques and Issues

Most who hunt section lines do so in pursuit of either geese or Chinese ringneck pheasants.[51] Very different methods and techniques have evolved for hunting these birds.[52] South Dakota is billed as the "Pheasant Capital of the World" and attracts many section line hunters who drive dirt and gravel roads, watching for pheasants.[53] Upon sighting a rooster, the passenger will quickly exit the vehicle and attempt a shot.[54] This method presents difficulties as pheasants are apt to run rather than fly, and can disappear quickly into the brush. A second pheasant hunting technique is to park the vehicle and walk through ditches which appear to have good cover for the birds.[55] Most pheasant section line hunting occurs on country roads.[56]

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rather than mandatory); Riverside Township v. Newton, 75 N.W. 899 (S.D. 1898) (holding that the section line easements attach to school lands); Keen v. Board of Supervisors of Fairview Township, 67 N.W. 623 (S.D. 1896) (denying relief to a landowner when the township proposed to lay a road along a section line which ran parallel to an existing highway and rejecting the claim that the establishment of the old road operated retroactively to vacate the unopened highway); Smith v. Pennington County, 48 N.W. 309 (S.D. 1891) (confirming the holding of *Wells* in a companion opinion to that case).

51. Tom Magedanz, South Dakota Legislative Research Council, Issue Memorandum No. 96-21, Section Line Hunting: South Dakota Tradition, South Dakota Controversy 2-3 (1996) [hereinafter Magedanz]. Hunting in general in South Dakota is excellent and varied and the gamebird species also include sharptail grouse, prairie chickens, bowhite quail, Hungarian partridge, doves, jacksnipe, ducks and geese. Byron Dalrymple, Complete Guide to Hunting Across North America 394 (1970) [hereinafter Dalrymple].

52. Magedanz, *supra* note 51, at 2.

53. Dalrymple, *supra* note 51, at 398; Magendanz, *supra*, note 51, at 2. The ringneck pheasant, a bird introduced from China, found its most perfect habitat in South Dakota. Dalrymple, *supra* note 51, at 398. In the 1940's, pheasant populations were estimated at upwards of fifty million birds. *Id.* "Probably the most significant characteristic of the pheasant is his adaptability to private preserve shooting. The bird is largely responsible for the thousands of these shooting areas now in existence." Larry Koller, The Treasury of Hunting 168 (1965) [hereinafter Koller]. South Dakota has designated the pheasant as its official state bird. S.D.C.L. § 1-6-9 (1992).

54. Hunters must exit their vehicles before firing since it is illegal for any person in or on a vehicle to take game or discharge a firearm at any wild animal. S.D.C.L. § 41-8-37 (1991). An exception exists for the hunting of coyotes, rabbits, hares, rodents and foxes. *Id.* Holders of disabled hunting permits may shoot at game from standing vehicles in fields or woods. *Id.*

55. Magedanz, *supra* note 51, at 2. While this method significantly reduces safety risks caused by vehicles cruising too slowly or excited hunters who slam on their brakes, some landowners do not want hunters in the right-of-way. *Id.* *See also* Koller, *supra* note 53, at 167 (noting that the ringneck pheasant is a farm bird whose habitat is heavy, concealing cover where feed such as wild rose hips, berries and corn is available).

56. Magedanz, *supra* note 51, at 2. Some hunters do attempt to drive unimproved section lines for pheasants. *Id.* "[F]or many South Dakotans, road hunting is one of the few pheasant hunting opportunities left open to them. . . ." *Id.* at 3. While road hunting for pheasants is popular, the more typical method involves either one or two hunters with a good bird dog walking along concealing ground cover, or a bigger party of hunters concentrating on a corn field. Koller, *supra* note 53, at 167. Koller explains:

> Half of the party takes stands at the end of a corn strip and the other half moves toward them through the corn. The birds run ahead of the drivers, usually following the rows, until they emerge under the guns at the far end. When the barrage begins and the ringnecks realized they are trapped between two lines of hunters, they take off in great confusion.

Id. While safety concerns about road hunting are widespread, most pheasant hunting accidents occur with these large parties of hunters using blocking methods rather than with road hunting. Magedanz, *supra* note 51, at 3.

Section line hunting for geese is a very different matter, and is concentrated largely along the Missouri River.[57] Geese fly southwards through South Dakota in incredible numbers, and rely upon harvested cornfields near larger bodies of water for their feed. While pheasant hunting generally involves walking or driving for the birds, goose hunters must wait in a camouflaged position for the geese to come to them. Goose hunters will park their vehicles and walk for some distance before concealing themselves and waiting for geese to fly within a shotgun's range. Unlike pheasant hunting, most goose section line hunting occurs on roadless section lines.[58]

Hunting is king in South Dakota, both as a leisure activity and as an economic force, and hunting forms a key component in the history and culture of the state.[59] Over the years, South Dakota has consistently ranked among the top five states hosting the most nonresident hunters

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57. MAGEDANZ, *supra* note 51, at 3. Larry Koller has written:

> The goose hunter is a specialist among wild-fowlers. He hunts geese to the exclusion of other webfoots and, indeed, must concentrate his efforts on finding the most-used inland feeding grounds, digging pit blinds, collecting a good spread of decoys, and then waiting for good shooting weather. Throughout North America a multitude of gunning setups and methods are used, of course, based on the feeding and resting areas of the birds. The goose hunter picks his shooting spot and type of blind depending upon local conditions, but, in any case, his hunting will be strictly for geese even in areas heavily populated with other waterfowl.

KOLLER, *supra* note 53, at 197. *See also* DALRYMPLE, *supra* note 51, at 405 (stating that goose hunting in South Dakota is generally best along the Missouri River and on private lands where grain is grown and flocks go out to feed).

58. MAGEDANZ, *supra* note 51, at 3. The conflicts between hunters and landowners in section line goose hunting still arise, but in a different manner:

> [G]oose 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.

Id.

59. *See* MAGEDANZ, *supra* note 51, at 1 (stating that South Dakota offers some of the finest pheasant and goose hunting in the world, and that in the fall, hunters converge from all parts of the nation to funnel large amounts of money into the South Dakota economy). *See also*, A.A. Volk and V.E. Montgomery, *Hunting in South Dakota, 1973*, 112 UNIVERSITY OF SOUTH DAKOTA BUSINESS RESEARCH BUREAU (1974) (detailing the economic impact of hunting in the state). John Milton has written:

> [T]here are an estimated 400,000 guns in a state whose population is roughly 660,000. Two guns for every three people. This phenomenon has been explained as part of the state's heritage, as an indication that the frontier is still a very real factor in the lives of South Dakotans. It is not uncommon, especially in West River, to see two or three rifles hanging in the back of a rancher's pickup truck. One-fifth of the state's population is issued hunting licenses annually. During one of the periodic financial crises in the state (these are usually caused by crop failures), when it was difficult to attract teachers to the colleges and universities, many of those who accepted employment did so because of the hunting opportunities. For years, when two nonhunters met in the street, in any town, each was surprised to discover that there was more than one who did not like to hunt.

JOHN R. MILTON, SOUTH DAKOTA: A HISTORY 161 (1977).

each year.[60] Yet while most of the other states which draw the highest numbers of nonresident hunters have huge tracts of public land, South Dakota lands, by comparison, are held largely in private hands.[61] In the past years, however, public access for hunters in the state has been repeatedly constricted.[62]

E. Hunting: Rights and Restrictions

South Dakota recognizes wild game as the property not of the private landowner, but of the state.[63] As the sovereign owner of all wild game within its borders, the state may pass laws to protect and manage wild game; this power has been described as falling within the state's police powers.[64] Similarly, the state may regulate the manner and means by which wild game may be taken, and impose such restrictions and conditions as it deems needful or proper.[65] State restrictions on hunting must, however, be defensible as a proper exercise of the state's police powers.[66] South Dakota's first hunting laws were passed in 1899.[67] The numerous

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60. Roger Pries, *Legislative Study Committee Convenes - Access and Licenses*, South Dakota Wildlife Federation: Out of Doors, 1 July 1997, at 1 [hereinafter Pries].

61. *Id.* Tom Magedanz notes that a special case for access to section lines for the purpose of hunting in South Dakota exists for another reason:

> The four primary pheasant hunting states in the nation are South Dakota, Iowa, Nebraska, and Kansas, with South Dakota and Iowa having the largest number 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 cases while they are in motor vehicles). Although many other states also prohibit section line hunting, pheasants are better suited than game birds to road hunting, which makes broad comparisons with road hunting laws in other states less valid.

Magedanz, *supra* note 51, at 1-2.

62. *See infra* notes 85-137, and accompanying text for a narrative history of the judicial and legislative restrictions on the public right to hunt along statutory section lines in South Dakota.

63. S.D.C.L. §§ 41-1-2, 41-11-1 (1991); State v. Kemp, 44 N.W.2d 214 (S.D. 1949), *appeal dismissed*, 340 U.S. 923, 71 S.Ct. 498 (1951).

64. State v. Coffee, 556 P.2d 1185 (Idaho 1976); State ex rel. Nepstad v. Danielson, 427 P.2d 689 (Mont. 1967); Schwartzman v. Berle, 415 N.Y.S.2d 187 (N.Y. Sup. 1979); State v. Saurman, 413 N.E.2d 1197 (Ohio 1980), *Cf.* Schakel v. State, 513 P.2d 412 (Wyo. 1973) (holding that the state is not the owner of wildlife within its borders, but holds such wildlife as trustee). The state also has, under its police powers, full authority over public highways. Tott v. Sioux City, 155 N.W.2d 502 (Iowa 1968); Herman v. Lee, 316 N.W.2d 56 (Neb. 1982); Timm v. State, 110 N.W.2d 359 (N.D. 1961).

65. State v. Goyette, 407 A.2d 1104 (Me. 1979). The South Dakota Supreme Court has described hunting as a privilege rather than a right. State v. Halverson, 277 N.W.2d 723, 724 (S.D. 1979). *But see* Whisker, *supra* note 16, at xvii (finding a right to hunt in the 9th Amendment and teachings of John Locke). Generally, state governments regulate hunting but federal agencies protect endangered species. Lueck, *supra* note 15, at 626. For examples of restrictions the state of South Dakota places on the taking of wild game, see S.D.C.L. § 41-8-39 (Supp. 1997) (prohibiting the use of aircraft in hunting), S.D.C.L. § 41-8-41 (1991) (requiring big game hunters to wear a flourescent orange exterior garment), S.D.C.L. § 41-8-30 (1977), *repealed by* 1984 S.D. Laws ch. 273 § 76 (granting Game, Fish and Parks the power to limit the number of hunters in a party by regulation). *See also* 1909 S.D. Laws ch. 240 § 24, *later codified at* S.D.C. § 10510 (1929), *and since repealed* (stating that "[n]o person shall hunt, pursue, catch, take or kill any [game animal] with any dog or dogs").

66. Shouse v. Moore, 11 F.Supp. 784, 787 (E.D. Ky. 1935); State *ex rel.* Ogelsby v. Hand, 119 So. 376, 378 (Fl. 1928); State v. Rathbone, 100 P.2d 86, 92 (Mont. 1940).

67. 1899 S.D. Laws ch. 90, *later codified at* Rev. Codes of S.D. §§ 3054-3099 (1903). Interestingly, persons who testified against others accused of violating the game laws were granted the evidentiary protection of having their testimony inadmissable against them in any subsequent

challenges to government restrictions on hunting methods, as well as the "hunter harassment laws" have been largely unsuccessful.[68]

Generally, a private landowner may prohibit hunting by posting his or her land.[69] Hunting on private land is usually subject to whatever conditions the property owner imposes.[70] Although landowners have long been able to prevent persons from hunting upon their property, only in the last twenty-five years has South Dakota prohibited hunting on private property without the property owner's permission.[71] Prior to this change, private lands were open to hunters unless posted.

Within the broad scope of hunting on private property laws lie the issue of public hunting rights within section line right-of-ways.[72] Section line hunting questions often turn on the definitions of trespass.[73] Trespassing law in South Dakota falls into three general areas: criminal trespass,

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proceeding. REV. CODES OF S.D. § 3069 (1903). The first South Dakota game law was ambitiously entitled "An Act for the Protection of Game, and the Appointment of Wardens, and the Licensing of Hunters, and Prescribing Penalties for the Violation of its Provisions." 1899 S.D. Laws ch. 90. Among its provisions, the act penalized the killing of grouse or quail between January and September, and the killing of any insect-eating bird or songbird at any time, crows, blackbirds and sparrows excepted. *Id.* § 1(1).

68. *See, e.g.*, United States v. Molt, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979) (finding that Lacey Act which prohibits transportation of wildlife in violation of state, federal, or foreign laws does not unconstitutionally delegate legislative power to foreign governments), Sierra Club v. Froehlke, 534 F.2d 1289 (D. Mo. 1976) (holding due process protections not violated by a regulation enacted under Migratory Bird Treaty Act providing that no person may leave migratory game birds at any place without an attached tag for failing to require proof of criminal intent); United States v. Blair, 488 F.Supp. 22 (D. Nebr. 1979) (upholding federal statute prohibiting hunting from aircraft on basis of commerce clause); Montana Outfitters Action Group v. Fish and Game Commission of Montana, 417 F.Supp. 1005 (D. Mont. 1976) (holding issuance of big game combination licenses to nonresident hunters does not violate equal protection); State v. Ball, 627 A.2d 892 (Conn. 1993) (upholding hunter harassment law against first amendment free speech challenge); State v. Rudolph, 289 N.W.2d 484 (Minn. 1979) (holding prohibition against "shining" for wild animals not unconstitutionally vague); *But see* Dorman v. Satti, 678 F.Supp. 375 (D. Conn. 1988), *aff'd*, 862 F.2d 432, *cert. denied*, 109 S.Ct. 2450, 490 U.S. 1099 (holding that conduct proscribed by hunter harassment law, penalizing those who interfere with persons engaged in lawful taking of wildlife or acts in preparation for such taking sweeps beyond state's regulatory power over hunting and is unconstitutionally vague since the statute could reasonably be ready to encompass buying supplies long before the hunt took place, or even getting a good night's sleep before embarking on a hunting trip); Harris v. State, 395 So.2d 1109 (Ala. Cr. App. 1981) (holding statute unconstitutional which provided that certain traps would not be permitted in counties of certain populations because of the lack of a rational relationship between the population classification and the purpose of the statute); Schakel v. State, 513 P.2d 412, 414 (Wyo. 1973) (stating that state's power as trustee of wildlife does not extend to an arbitrary power to make discriminatory laws affecting hunting).

69. Kellogg v. King, 46 P. 166 (Cal. 1896); Rosenthal-Brown Fur Co. v. Jones-Frere Fur Co., 110 So. 630 (La. 1926); Buras v. Salinovich, 97 So. 748 (La. 1923).

70. Council v. Sanderlin, 111 S.E. 365 (N.C. 1922).

71. 1973 S.D. Laws ch. 269 § 1, *later codified at* S.D.C.L. § 41-9-1 (1991). However, persons may hunt upon lands within the Black Hills fire protection district lying south of Interstate 90 without permission unless the land is posted or the landowner gives oral notification to the hunter not to do so. S.D.C.L. § 41-9-2 (1991). In other words, hunting on private property throughout South Dakota requires landowner permission, except for the Black Hills fire protection district which must be posted to prevent trespass.

72. MAGEDANZ, *supra* note 51 at 4.

73. See *infra* notes 85 and 97 and accompanying text for a summary of the facts surrounding the *Tracy* and *Peters* cases. Along with trespass, the law prohibiting intentional interference with hunting often surfaces amid the controversy of section line hunting rights. S.D.C.L. § 41-1-8 (1991). See *infra* note 106 for the text of this statute.

civil trespass, and hunting trespass.[74] A civil trespass is characterized as the intentional entry onto the land of another resulting in some sort of injury, and entitles the landowner to damages as measured by either the cost of restoration and repair or the difference in the value of the real estate before and after the trespass.[75]

South Dakota's general criminal trespass law can be found at S.D.C.L. section 22-35-6.[76] That law defines trespass as entering and remaining in a place, knowing one is not privileged to do so, after having been told not to enter by a posting of the property, a verbal communication, or the construction of a fence designed to keep out intruders.[77] The general trespass law implies that unless the owner has taken affirmative steps to keep intruders out, the public is allowed to enter.[78]

From 1899 until 1973, the principle of South Dakota hunting trespass law was that hunters could enter and hunt private land without the landowner's permission.[79] Hunters could not, however, enter upon posted land, land enclosed by woven wire fences, or hunt upon land containing standing crops or within 660 feet of livestock, dwellings, schools, or churches.[80] During this period, road hunting was a common practice and legal questions about section line hunting were infrequent.[81] In 1973, this policy was reversed so that hunters who failed to obtain permission to hunt would be classified as trespassers.[82] In 1981, hunting privileges were fur-

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74. MAGEDANZ, *supra* note 51, at 4.

75. Denke v. Mamola, 437 N.W.2d 205, 208 (S.D. 1989). *See also* Gross v. Connecticut Mutual Life Ins. Co., 361 N.W.2d 259 (S.D. 1985) (denying injunction for property owners whose land was flooded by defendants, but affirming award of damages when legal remedy not shown to be inadequate); Ward v. LaCreek Elec. Assoc., 163 N.W.2d 344 (S.D. 1968) (holding that owner was not entitled to diminution in value of ranch as a result of water damage). Courts have also allowed recovery of the discomfort and annoyance caused by the trespass. Miller v. Nat'l Broad. Co., 232 Cal.Rptr. 668 (Cal. App. Ct. 1987); Statler v. Catalano, 521 N.E.2d 565 (Ill. App. Ct. 1988), *appeal denied*, 530 N.E.2d 265. However, travellers may enter upon another's land where there is a public highway, so long as his presence there is reasonable. RESTATEMENT (SECOND) OF TORTS § 192 (1964).

76. S.D.C.L. § 22-35-6 (1988).

77. *Id.* This offense is classified as a Class 2 misdemeanor, and as a Class 1 misdemeanor if the trespasser defies an order to leave. *Id.* South Dakota law also defines the entry into a building knowing one is not privileged to do so as a Class 1 misdemeanor. S.D.C.L. § 22-35-5 (1988).

78. MAGEDANZ, *surpa* note 51 at 4.

79. MAGEDANZ, *supra* note 51, at 4.

80. *See* 1899 S.D. Laws ch. 90 § 1(7), *later codified at* Revised Codes of South Dakota § 3054(7) (1903) (penalizing hunting upon enclosed, occupied or cultivated lands without the landowner's consent); S.D.C. § 25.0427 (1939) (prohibiting hunting within 660 feet of dwellings, churches, schools, or livestock); S.D. Sess Laws ch. 225 (1972), *later codified at* S.D.C.L. § 41-9-1 (1991) (providing that no hunter may enter land enclosed by woven wire, containing livestock, or upon which there is unharvested grain without permission). These restrictions generally continue today. S.D.C.L. §§ 41-9-1.1, 41-9-2 (1991 & Supp. 1997). Further restrictions on hunting include: S.D.C.L. § 41-8-37 (1991 & Supp. 1997) (prohibiting firearms from being fired from vehicles on public highways or protruding from vehicle windows) and S.D.C.L. § 41-9-1.2 (Supp. 1997) (prohibiting big game hunting from section lines).

81. MAGEDANZ, *supra* note 51, at 5.

82. 1973 S.D. Laws ch. 269 § 1, *later codified at* S.D.C.L. § 41-9-1 (1991). Roger Pries has written of this law:

> In 1972, the state legislature, at the urging of west river interests, passed a bill which closed what was commonly referred to as "the open trespass hunting law." Land that was not posted against trespasser hunting, was open to hunting by the public. In practice,

ther restricted when hunting was prohibited on "unimproved" section lines.[83] It was this new limitation which fueled the disputes surrounding section line hunting which continue even today.[84]

F. Contemporary Controversies

1. State v. Peters

On the morning of November 25, 1981, Leo Peters traveled down a section line in Sully county to hunt geese.[85] A pair of compacted vehicle tracks, some deeper than the length of an expanded shotgun shell, ran along the fenced section line, and the trail had likely been cleared of rocks to avoid damage to vehicles.[86] Lynn Hawkins ran a commercial goose

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> most hunters, if they were merely going to "walk" a small weed patch near the road for a rooster, they didn't ask. If they were going to go out and set up goose decoys, they probably asked, even if they didn't have to. This agreement allowed for some access for all and meant that a landowner who did not mind hunters on his property, would not be interrupted during the busy harvest season, or in the predawn hours, or disrupted at the supper table, by hunters seeking permission. East river was very much against the Legislature doing away with the "open trespass law" but west river said, just give us this and we won't complain about hunters anymore, and so to not have different laws on one side of the river vs. the other side, east river went along with it.

Pries, *supra* note 60, at 1. Byron Dalrymple supports Pries' view that even before the 1973, most private-land hunting in the state was done with the permission of the landowner, and that permission to hunt was generally obtained without difficulty. Dalrymple, *supra* note 51, at 395. The new law meant that instead of landowners having to post their land against hunter entrance with signs, it was automatically closed. Pries, *supra* note 60, at 1. Tom Magedanz has added:

> 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.

Magedanz, *supra* note 51, at 5 (emphasis in original); S.D.C.L. § 41-9-1.1 (1991).

83. S.D.C.L. § 41-9-1.1 (Supp. 1991 & Supp. 1997); Magedanz, *supra* note 51, at 5. Roger Pries comments:

> By the late 1970's, west river and areas along the Missouri River corridor were looking for more ways of excluding the public from access opportunities and rights-of-way hunting. Finally in 1981, the citizen group "Committee To Protect Hunting" agreed to go along with the development of the classification of rights-of-ways, as improved and unimproved, by the SD Legislature. The "Committee" was opposed to complete banning of hunting on unimproved section lines. The definition of an unimproved section line, as explained to the Legislature would be one that was unfenced an in native grass, which were very few in number according to the sponsor of the bill. I have visited the actual section line that this bill really generated from, a section line located just south of Chamberlain, SD leading to the public land along Ft. Randall Reservoir. I have visited extensively with the Chamberlain resident who was using the section line to reach the public land. The landowners on each side of the section line did not want him or anyone to travel down, or possible hunt [sic] along the 66 ft. wide strip. The section line was indeed fenceless and native grass for the most part, and still is.

Pries, *supra* note 60, at 1. However, a hunter may still enter unarmed onto private land without the landowner's consent to retrieve game legally taken from a section line or other land on which the hunter is authorized to hunt. S.D.C.L. § 41-9-8 (1991).

84. Magedanz, *supra* note 51, at 5.

85. State v. Peters, 334 N.W.2d 217, 218 (S.D. 1983).

86. *Id.* at 218, 220-221. The section line was travelled only for farming and commercial hunting purposes. Brief for Appellee at 2, *Peters*, 334 N.W.2d 217 (No. 13765) [hereinafter *Peters* Appellee's Brief]. Within the court's opinion, three photographs of the section line trail were printed, one showing the depth of the tracks as referenced by a spent shotgun shell. *Peters*, 334 N.W.2d at 219-220.

hunting operation abutting this section line.[87] Following one morning shoot, Hawkins was driving a party of paying customers from the operation's goose pits when he spied a prone Peters on the section line, watching for passing geese.[88] After questioning Peters, Hawkins called the sheriff.[89]

Peters was convicted at trial of trespassing on private land.[90] The South Dakota Supreme Court reversed the conviction, holding that the section line was improved, and therefore Peters had a right to hunt it without seeking the landowner's permission.[91] The court examined the history of S.D.C.L. sections 41-9-1 and 41-9-1.1 and determined that if a section line is improved at all for vehicular passage, it is open to hunting, and the permission requirement of S.D.C.L. section 41-9-1 only applies if the section line is totally unimproved.[92] The justices specifically refrained from inquiring into whether the tracks which formed the trail had been made by hunters

87. *Peters*, 334 N.W.2d at 219. This business served about seven customers a day during the two month hunting season each fall, with about 434 sportsmen visiting in that season. *Id.* The hunters would meet Hawkins at the section line, and he carried them to the goose pits. *Id.*

88. *Id.* Peters had done no shooting. *Id.*

89. *Id.*

90. *Id.* at 217-218. The trial court found that "there were no culverts put in, ditches graded, gravel placed on (sic), no evidence of rocks being removed from the line, nor low places being filled in." *Peters* Appellee's Brief, *supra* note 86, at 7. The trial court found that Peters' conduct amounted to a violation of S.D.C.L. section 41-9-1 which reads:

> Except as otherwise provided in § 41-9-2, no person may hunt, fish, or trap upon any private land not his own or in his possession without permission from the owner or lessee of such land. A violation of this section is a Class 2 misdemeanor and is subject to § 41-9-8.

S.D.C.L. § 41-9-1 (1991). A Class 2 misdemeanor is punishable in South Dakota by up to thirty days imprisonment in a county jail, a $200 fine, or both. S.D.C.L. § 22-6-2 (Supp. 1997). Leo Peters was also tried but acquitted of hunting within 660 feet of livestock. *Peters*, 334 N.W.2d at 219.

91. *Peters*, 334 N.W.2d at 222. "It is not an unimproved section line banned to public hunting. It has clearly been altered from its natural state in some ways, for the purpose of facilitating vehicle traffic." *Id.* Chief Justice Fosheim wrote for the majority. *Id.* at 217.

92. *Id.* at 221. "Any alteration suffices [to meet the requirement that the section line be improved and open the section line to public hunting]." *Id.* at 222. The court rejected the trial court's finding that no rocks had been removed, stating that it appeared that the section line had likely been cleared of rocks to avoid damage to vehicles. *Id.* at 221; *Peters* Appellee's Brief, *supra* note 86, at 7. The opinion quoted from the cross-examination of Lynn Hawkins where Hawkins indicated that if there had been rocks, he probably would have moved them rather than drive around them, and that there were no rocks. *Peters*, 334 N.W.2d at 221. The court noted:

> SDCL § 41-9-1 was amended in 1981 to include the unimproved section line exception. The uncontradicted evidence shows the amendment was prompted when a venturesome goose hunter attempted to hunt geese on a completely unidentified section line in a pasture. It seems this individual engaged a surveyor, platted out and drove stakes in the ground to determine the section line. He then undertook to hunt geese from the hills and ravines on a section line paralleling the Missouri River. The rancher and the Stockgrower's Association apparently took a dim view of this maneuver. Two unsuccessful legislative attempts to ban section line hunting followed. The 1981 amendment apparently was a compromise worked out by stockmen and sportsmen in an effort to prevent unreasonable intrusions while essentially preserving the traditional South Dakota right to road hunt.

Id. The court concluded that the right to hunt on highways is the general rule, with the "unimproved section line" provision as an exception to that rule. *Id.* Furthermore, the court noted that statutes granting public access to public highways are consistently construed liberally in favor of the public's right of access and use. *Id.* at 222. "The position of the appellee would put in question the public's right to hunt on hundreds of miles or ungraded section line grass roads in South Dakota that are regularly traveled during the pheasant season." *Id.* at 222-223.

or by farmers: "We refrain from agonizing over whether farm vehicles, goose hunters, utility service vehicles, or others made the compacted tracks."[93] Because the court determined that the section lines in question were "improved," it followed that Leo Peters had not been trespassing.

Justice Dunn, joined by Justice Morgan, dissented.[94] Justice Dunn wrote that while the unimproved section line exception to the general rule permitting section line hunting applies to the vast ranches of western South Dakota, it also applies to lands which have been cultivated up to the fenceline.[95] The dissent reasoned that the mere fact that a rancher has chosen to drive the fenceline to check cattle, move machinery, or transport hunters from a goose pit should not open up the section line to public hunting.[96]

2. State v. Tracy

Pat Tracy managed commercial goose hunting pits on a farm straddling the Hughes-Sully county line along Grey Goose Road in South Dakota.[97] On November 14, 1993, a group of four goose hunters from Pierre (hereinafter the "Ambach party") turned their Chevrolet Suburban off Grey Goose Road, opened a gate, and drove along the section line.[98] The Ambach party followed a trail made by the landowner's farm equipment, driving onto cultivated land where the trail veered off from the section line.[99] Coming upon a marshy slough where the trail left the section line entirely, they cased their shotguns and continued on foot around the wetlands.[100] Further on, the Ambach party stopped to hunt at a point where the farm trail had rejoined the section line.[101]

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93. *Peters*, 334 N.W.2d at 222. The state had taken the position that an alteration *for the purpose* of facilitating vehicular traffic was required to bring the section line within the language of S.D.C.L. section 41-9-1.1. *Peters* Appellee's Brief, *supra* note 86, at 4, 8. Although the South Dakota Supreme Court found that the section line had been altered for this purpose, it concluded that any alteration suffices. *Peters*, 334 N.W.2d at 222.

94. *Peters*, 334 N.W.2d at 223 (Dunn, J., dissenting).

95. *Id.* Justice Dunn noted that the photographs of the trail indicated that the section line had been cultivated. *Id.* The tracks did not appear to be well-worn or altered in any way from their natural state to facilitate vehicular traffic, but rather were fresh ruts, probably made when the land was wet. *Id.* "In fact, it appears to be cultivated ground which would make vehicular traffic more difficult." *Id.*

96. *Id.*

97. State v. Tracy, 539 N.W.2d 327, 328 (S.D. 1995). About one thousand hunters would pay $50 per day per gun to hunt geese from the pits every year. *Id.* Pat Tracy's duties also included managing the farm. *Id.* Interestingly, both *Tracy* and *Peters* arose out of events in Sully county. *Id.* at 330. This is prime waterfowl hunting country, primarily controlled by commercial goose hunting operations and private hunting clubs. *Peters*, 334 N.W.2d at 218.

98. Brief for Appellant at 1, *Tracy*, 539 N.W.2d 327 (No. 18978) [hereinafter *Tracy* Appellant's Brief]. The hunters did not ask the permission of the landowners, Harvey and Andrea Sheehan, to hunt or travel upon their land. *Id.* at 1-2.

99. *Tracy*, 539 N.W.2d at 328.

100. *Id.* The Suburban could not have been driven through the natural drainage ravine which had been designated as a permanent natural wetlands area by the federal government and never altered from its natural state. *Tracy* Appellant's Brief, *supra* note 98, at 4. The marshy slough and ravine area was about 100 feet wide. *Id.*

101. *Tracy*, 539 N.W.2d at 328, 329. The dirt trail where the Ambach party stopped to hunt had been made by the landowner's farm vehicles and machinery and went between two irrigation pivots. *Tracy* Appellant's Brief, *supra* note 98, at 5. At the point where the Ambach party stopped to hunt, they were on the right-of-way. *Tracy*, 539 N.W.2d at 328. Two maps of the trail

The water running through the marshy slough traversed by the Ambach party ultimately fed a pond, around which several commercial goose hunting pits were located.[102] Pat Tracy and his brother Brian were driving hunters between the pits and the operation's clubhouse when Brian Tracy noticed the Ambach party and went to investigate.[103] After showing the Tracys their licenses, the Ambach party watched them leave the scene, but Pat Tracy returned a short while later to circle the Ambach party repeatedly in his truck and take photographs.[104] Sufficiently deterred, the Ambach party packed up their guns and left.[105]

At trial, Pat Tracy was convicted of intentionally interfering with lawful hunting.[106] On appeal, he argued that he could not be convicted of interfering with lawful hunting because the Ambach party had been hunting illegally from an unimproved section line.[107] The South Dakota Supreme Court agreed, and reversed Tracy's conviction.[108] The court

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along the section line were printed with the Supreme Court opinion. *Id.* at 333, 334. The hunters shot three or four geese from this location. *Tracy* Appellant's Brief, *supra* note 98 at 5.

102. *Tracy* Appellant's Brief, *supra* note 98 at 4.

103. *Tracy* Appellant's Brief, *supra* note 98, at 7. Craig Ambach had shot a goose from the section line, laid down his gun, and walked out to retrieve the bird when he noticed a pickup coming at him at a high rate of speed. Brief for Appellee at 5, *Tracy*, 539 N.W.2d 327 (No. 18978) [hereinafter *Tracy* Appellee's Brief].

104. *Tracy*, 539 N.W.2d at 328. Brian Tracy had asked the party to leave and they refused. *Tracy* Appellee's Brief, *supra* note 103 at 5. Brian Tracy talked to his brother Pat by two-way radio and Pat Tracy quickly came to his brother's aid, driving his pickup at a high rate of speed toward the group and sliding sideways into the snowbank that Craig Ambach's brother was lying on; heated words were exchanged. *Id.* Though there is a dispute as to what occurred next, Craig Ambach testified at trial that the Tracys left together in Pat Tracy's pickup, leaving Brian Tracy's pickup parked near the hunters to deter them from further hunting. *Id.* at 5-6. Shortly thereafter, Pat Tracy returned to circle the Ambach party and take photographs for approximately thirty minutes. *Id.* at 6. According to Tracy, it took only ten minutes for him to take the pictures of the Ambach party. *Tracy* Appellant's Brief at 8. As all this activity had ruined any further opportunities for goose hunting, the Ambach party cased their guns and departed. *Tracy* Appellee's Brief, *supra* note 103 at 6.

105. *Tracy*, 539 N.W.2d at 328. The Tracys' activity scared the geese away and ruined the Ambach party's hunting. *Tracy* Appellee's Brief, *supra* note 103, at 6.

106. *Tracy*, 539 N.W.2d at 328. Tracy was convicted of violating S.D.C.L. section 41-1-8. *Id.* at 329. The statute provides:

> No person may intentionally interfere with any person or group of persons lawfully engaged in the process of taking or attempting to take any game or fish. No person may engage in activity specifically intended to harass or otherwise prevent the lawful taking of any game or fish. No person may engage in activity to scare or disturb any game with specific intent to prevent their lawful taking. This section may not be construed to prohibit a landowner from revoking a prior grant of permission to hunt on his land. A violation of any provision of this section is a Class 2 misdemeanor.

S.D.C.L. § 41-1-8 (1991). The trial court found that Pat Tracy specifically intended to harass the Ambach party and prevent their lawful taking of game by parking and circling them with his truck. *Tracy*, 539 N.W.2d at 328. At the same time that Tracy was charged with the intentional interference of lawful hunting, the state charged the Ambach party with trespassing. *Id.* at 328 n.1. Three of the original Ambach party and a fourth man were also charged with hunting trespass on the same land on November 21, 1993, one week later. *Tracy* Appellant's Brief, *supra* note 98 at 9. Subsequent to Tracy's conviction, the state moved to dismiss the trespass charges based on the trial court's finding that the Ambach party had been lawfully hunting. *Id*

107. *Tracy*, 539 N.W.2d at 328, 329. Tracy raised the defense that the Ambach party was not hunting lawfully, but in fact trespassing on private property. *Tracy* Appellant's Brief, *supra* note 98 at 9. Tracy also argued that his conduct did not constitute "intentional interference." *Tracy*, 539 N.W.2d at 328, 329. The court, however, did not reach that contention. *Id.* at 332.

108. *Tracy*, 539 N.W.2d at 332. Justice Gilbertson wrote for the court. *Id.* at 327.

noted that although the public at large had a right to travel the section line in question, whether the Ambach party could lawfully hunt along it was another separate issue.[109] Under *Peters*, section line hunting without the permission of the adjoining landowner was lawful if the section line was improved for vehicular travel.[110] The court framed the issue as whether a section line partially containing a farm trail met the definition of "improved."[111]

Noting that S.D.C.L. section 41-9-1.2 lacks a definition of "improvement," the court held that *Peters* had erred in its "overly broad" definition.[112] Instead, the court followed the rationale of the dissent in *Peters* and held that a section line would meet the definition of "improved" when the terrain had been intentionally enhanced for vehicular travel, and that a hunter can then travel down it because of this alteration.[113] "We hold that a section line is improved for the purposes of 'facilitating vehicular passage' when the improvement is in the nature of intentional enhancement of the natural terrain's utility for travel or adaptation which will permit travel where it was not previously possible."[114] In other words, the court appeared to require that but for the intentional improvement, the section line would be impassable by vehicle.[115] Another reading of the opinion suggests that the court's concern was granting hunting rights along section lines merely based on a farmer's use of tractors or heavy machinery which left tracks.[116] In the case at hand, the court drew special attention to the fact that the Ambach party had had to abandon their vehicle to reach the

109. *Tracy*, 539 N.W.2d at 330, *citing Peters*, 334 N.W.2d 217.

110. *Tracy*, 539 N.W.2d at 330. Unimproved section lines may be hunted as well, but only if the public commonly uses them for vehicular travel. *Id.* at 330 n.3, *citing* S.D.C.L. § 41-9-1.1 (1991). In this case, however, there was no question that the section line was not commonly used by the public for vehicular travel. *Id.* at 330. Therefore, the question was whether the section line was "improved." *Id.*

111. *Tracy*, 539 N.W.2d at 330, 331.

112. *Tracy*, 539 N.W.2d at 331. The court said:

> In *Peters*, the majority apparently considered the term "improvement" as being synonymous with "altered from its natural state in some ways, for the purpose of facilitating vehicular passage" and concluded "[a]ny alteration suffices." (citation omitted) Based on such a definition of an improvement, the majority found that tire tracks together with possible removal of rocks constituted improvements as contemplated within the terms of SDCL § 41-9-1.1. As a matterof statutory construction, *Peters* erred as this interpretation would mean the phrases "unimproved section lines" and "never altered from their natural state in any way" were synonymous and they are not. We doubt the Legislature intended to define a single concept in a single statute by the use of two such different phrases.

Id. For the text of S.D.C.L. section 41-9-1, see *supra* note 90.

113. *Tracy*, 539 N.W.2d at 331. The court noted that under the *Peters* definition of an "improvement" as "any alteration," an improved section line might actually be more difficult to travel down since vehicular travel can create mud holes and ruts which did not exist when the land was in its natural state. *Id.*

114. *Id.*, *citing* BLACK'S LAW DICTIONARY 757 (6th ed. 1990).

115. *See Tracy*, 539 N.W.2d at 331 (stating that "if one can travel down a section line because it is improved to facilitate such travel, it can be hunted upon").

116. *See Tracy*, 539 N.W.2d at 331 (stating that statute did not contemplate a fortuitous crossing of a piece of machinery heavy enough to leave a track). The right to hunt section lines does not hinge on whether the farmer drove his tractor across those lines. *Id.*

point where they hunted.[117]

3. Reis v. Miller

Reis involved a declaratory judgment action brought against the Governor, Attorney General, and Secretary of the Department of Game, Fish and Parks of South Dakota in their official capacities, challenging the validity of S.D.C.L. section 41-9-1.1 as it relates to hunting on improved section lines.[118] Four landowners brought the suit and presented witnesses who testified on the repeated harms caused by careless hunters.[119] Following a trial, the declaratory judgment was denied.[120]

On appeal to the South Dakota Supreme Court, section line hunting easements were challenged on the theory that the use of those highways for hunting was not included in the original grant of those highways in R.S. 2477, and on the ground that the easement violated the equal protection clauses of both the United States and the South Dakota Constitutions.[121] The court rejected both arguments and affirmed, upholding the right of the public to hunt unimproved section lines.[122]

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117. *Tracy*, 539 N.W.2d at 331. The court said:

> Clearly the Legislature did not intend to authorize hunting in situations where, in order to arrive at the hunting site on a section line, one has to abandon one's vehicle due to a deep marshy slough on the section line and impassable to vehicle travel, wade through that slough on foot, walk one-fourth mile across stubble with no tracks, and finally arrive at a set of tracks made by the landowner's machinery which happened to coincide with the section line.

Id.

118. *Reis*, 1996 S.D. 75, 550 N.W.2d 78; S.D.C.L. § 41-9-1.1 (1991). In 1996, this statute was amended; see *infra* notes 80, 82, 83, 93 and accompanying text.

119. *Reis*, 1996 S.D. ¶ 4, 550 N.W.2d at 79. Each plaintiff owned land subject to an easement for a section line highway; Reis was a resident of Tripp County, Hanson a resident of Day County, Nelson a resident of Sanborn County, and Kjerstad a resident of Haakon County. *Id.* ¶ 2. The witnesses included William Hartland, a farmer, who testified that his father had been hit in the legs by shotgun pellets fired from section line hunters, Virginia Hanson, a music teacher, who related an incident during goose season where a hunter was firing a shotgun within 300 feet of the school, Jeff Bush, a farmer/rancher/commercial hunting operator, who testified to congestion along section line roads and trash in the road ditches, Germaine Leber, a farmer, who testified about a stampede of calves caused by hunters, Sandra and James Garrett, farmer/ranchers, who testified about hunters driving section lines who would just slam on their brakes and start shooting, Rex Hurd, a farmer/meat grader, who had problems with hunters shooting near a horse he was training, Darrell Larson, a farmer/rancher, whose wife's windshield had been shot out by section line hunters, Flynn Fischer, a farmer/lawyer, who testified to shooting within 450 feet of a combine operated during harvest, and David Hanson, a farmer and one of the plaintiffs, who had lost a sheep to shotgun pellets during hunting season. Brief for Appellants 4-8, *Reis*, 1996 S.D. 75, 550 N.W.2d 78 (No. 19297) [hereinafter *Reis* Appellants Brief].

The defendants noted that many of these incidents did not involve road hunting and occurred over a fifteen year period. *Reis*, 1996 S.D. ¶ 4, 550 N.W.2d at 79. The defendants also pointed out that most of the incidents which did involve road hunting were already violations of current law, and that although such violations are difficult to police, a complete ban on road hunting would face the same problems of enforcement. *Id.* ¶ 18. The defendants also noted that several of the anecdotal incidents testified to were not caused by road hunting; congestion, for example, is caused not only by road hunting, but also by farm machinery and other transportation uses of the section line highways. Brief for Appellees at 17, *Reis*, 1996 S.D. 75, 550 N.W.2d 78 (No. 19297) [hereinafter *Reis* Appellees' Brief].

120. *Reis*, 1996 S.D. ¶ 5, 550 N.W.2d at 79.

121. *Id.* ¶ 9; U.S. CONST. amend. XIV; S.D. CONST. art. VI, § 18. Justice Sabers wrote for the court. *Id.* ¶ 1.

122. *Id.* ¶¶ 20, 24.

Dismissing the equal protection claim for lack of standing, the court devoted most of its attention to the question of whether public hunting is included in section line highway easements.[123] The plaintiffs' argument was that the 1866 Highway Act granting section line easements and 1870 territorial legislation which accepted that federal grant had not included public hunting.[124] In rejecting this argument, the court noted the trial court's application of four "rules of construction" to determine the scope of the Highway Act easement and discussed recent South Dakota cases addressing section line highways.[125] The court also declined to adopt the holding of *Rutten v. Wood*, a North Dakota Supreme Court case which had found that hunting on a section line is not incidental to the public's right to travel, because in fact hunting activities often interfere with this public right.[126]

Justice Gilbertson wrote a concurring opinion in which he stated that no historical support could be found for the contention that the Territorial

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123. The plaintiffs made their equal protection argument in less than on page in their brief on appeal. *Reis* Appellees' Brief, *supra* note 119, at 18; *Reis* Appellants' Brief, *supra* note 119 at 15-16. The only case cited by the plaintiffs was State v. Meidinger, 233 N.W.2d 331 (S.D. 1975). *Reis* Appellants' Brief, *supra* note 119, at 16. *Reis*, 1996 S.D. ¶¶ 23-24, 550 N.W.2d at 83-84. The Supreme Court affirmed the trial court's finding that the plaintiffs lacked standing to attack the constitutionality of a legislative decision without showing they have sustained or are in immediate danger of sustaining a direct injury as a result of the statute's enforcement. *Reis*, 1996 S.D. ¶ 23, N.W.2d at 83, *citing* Massachusetts v. Mellon, 262 U.S. 447, 448, 43 S.Ct. 597, 601 (1923). The court also cited Linda R.S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146 (1973). *Id.*

124. *Reis* Appellants' Brief, *supra* note 119, at 9-15; 43 U.S.C. § 932; 1870-71 Dakota Territory Session Laws, ch. 33, *later codified at* S.D.C.L. ch. 31-18 (1984). The plaintiffs' brief read:

> It is significant to note here that neither the federal nor the territorial legislation makes any reference to hunting, fishing or trapping. Only highways are mentioned. Appellant's (sic) contend that neither Congress nor the Territorial Legislature intended to create public hunting grounds through the enactment of the foregoing legislation. The intent was to create easements for the construction of roads and highways across the developing states of North and South Dakota. If the territorial legislation and SDCL 31-18 are to be strictly construed, then the Legislature has no right nor power to expand the easement to include public hunting on private property. Unless purchased or condemned by the State or one of its instrumentalities, the section line rights-of-way are just easements.

Reis Appellants' Brief, *supra* note 119, at 10-11. The plaintiffs relied upon a 1951 Attorney General Opinion reasoning that owners of property abutting a public highway could lawfully exclude hunters from taking game within the right-of-way. *Id.* at 13; 1951 S.D. Op. Att'y Gen. 277.

125. *Reis*, 1996 S.D. ¶ 13, 550 N.W.2d at 81. The first rule of construction is that public easements granted by Congress are not common law easements governed by common law rules of easements, but are governed by state law and subject to Congressional intent. *Id.*, *citing Barney*, 490 N.W.2d at 730, 731. Second, interpretations of statutory section lines are construed liberally in favor of the right of public access and use. *Reis*, 1996 S.D. ¶ 13, 550 N.W.2d at 81, *citing Peters*, 334 N.W.2d at 222. Third, the court's interpretation should not impair an existing right or prejudice the public interest unless the statutory language is so clear as to leave no reasonable doubt of its intention. *Reis*, 1996 S.D. ¶ 13, 550 N.W.2d at 81, *citing Peters*, 334 N.W.2d at 222. Fourth, the trial court had noted that *Peters* had rejected the argument that "the usual liberal construction allowing public use of section lines cannot be extended to this section line because it benefits only hunters and goes nowhere from the east end." *Reis*, 1996 S.D. ¶ 13, 550 N.W.2d at 81, *citing Peters*, 334 N.W.2d at 222. The court also discussed *Sample*, *Peters*, and *Tracy*. *Reis*, 1996 S.D. ¶¶ 14-16, 550 N.W.2d at 81-82; *Sample*, 157 N.W. 1016; *Peters*, 334 N.W.2d 217, *Tracy*, 539 N.W.2d 327.

126. *Reis*, 1996 S.D. ¶ 19, 550 N.W.2d at 83; Rutten v. Wood, 57 N.W.2d 112 (N.D. 1953). *Rutten* had relied upon the Minnesota case of *L. Realty Co. v. Johnson*. *Rutten*, 57 N.W.2d at 114, *quoting* L. Realty Co. v. Johnson, 100 N.W. 94 (Minn. 1904). In rejecting the *Rutten* case, Justice Sabers wrote: "The use by the public of section line rights-of-way for recreation, which includes hunting, dates back to the 1880's and has not been successfully challenged in this state to our knowledge." *Reis*, 1996 S.D. ¶ 19, 550 N.W.2d at 83.

Legislature, in accepting the federal right-of-way easements, had intended to limit hunting in those "ribbons of real estate."[127] Justice Gilbertson recited the common law doctrine that wild game is deemed the property of the state rather than the landowner.[128] Furthermore, the concurring opinion noted that it was not until 1899 that South Dakota placed any limitation on hunting anywhere in the state.[129]

4. *The Legislature Responds*

In 1996, in the wake of the *Tracy* decision, the South Dakota Legislature enacted S.D.C.L. section 41-9-1.3 to re-define when a section line highway is open for public hunting.[130] Previously, the requirement that a landowner's consent to hunt be granted did not apply to highways or rights-of-way, except for "unimproved section lines not commonly used as public right-of-way, and never altered from their natural state in any way for the purpose of facilitating vehicular passage."[131] The prohibition of hunting without consent on unimproved section lines was the exception to the general rule permitting section line hunting.[132] Subsequent to the 1996 amendment, the laws read somewhat differently.[133] Now the exception solely for "unimproved section lines not commonly used as a public right-

127. *Reis*, 1996 S.D. ¶ 38, 550 N.W.2d at 84 (Gilbertson, J., concurring). "During the Territorial period, no limitations can be found on hunting anywhere although I presume that a landowner could maintain an action for trespass for entering his land without his permission." *Id.*, *citing* Clark v. Bates, 46 N.W. 510 (S.D. 1874), *aff'd*, 95 U.S. 204 (1877).

128. *Reis*, 1996 S.D. ¶ 29, 550 N.W.2d at 84 (Gilbertson, J., concurring), *quoting* S.D.C.L. § 41-1-2 (1991); State v. Pollock, 365 N.W. 557, 558-559 (S.D. 1919).

129. *Reis*, 1996 S.D. ¶ 28, 550 N.W.2d at 84 (Gilbertson, J., concurring), *citing* S.D.C.L. § 41-9-1 (1991) (requiring the owners' permission to hunt on private land). Eighty-two years passed before the South Dakota Legislature sought to limit hunting within rights-of-way because of the realty's status. *Id.* 1996 S.D. ¶ 30. N.W.2d at 84 (Gilbertson, J., concurring), *citing* S.D.C.L. § 41-9-1.1 (1991 & Supp. 1997); *Peters*, 334 N.W.2d at 221.

130. 1996 S.D. Laws, Ch. 252, § 2, *now codified at* S.D.C.L. § 41-9-1.1 (Supp. 1997). Reaction to the *Tracy* decision had resulted in the introduction of two major bills in the 1996 South Dakota Legislative Session. MAGEDANZ, *supra* note 51, at 7. Magendanz has traced the history of this legislation:

> 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 redefine the definition of unimproved section lines, with the section line definition question taking up most of the discussion.

Id. at 7-8.

131. S.D.C.L. § 41-9-1 (1991).

132. *Peters*, 334 N.W.2d at 221. The right to hunt on highways is the general rule, with the unimproved section line provision as an exception. *Id.*

133. *See Reis*, 1996 S.D. ¶ 6 n.2, 550 N.W.2d at 80 n.2 (noting that S.D.C.L. section 41-9-1.1 had been amended).

of-way" remains, but divorced from the "and never altered in any way" language in the old statute, which has been eliminated.[134] Instead, a new statute has been added at S.D.C.L. section 41-9-1.3 which reads:

> For purposes of § 41-9-1.1 any public right-of-way along a section-line or other highway is open to public hunting, fishing, or trapping 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.[135]

How this statutory language will be interpreted by the courts of South Dakota remains to be seen.[136] The controversy and fluidity of the law is not likely to abate anytime soon, however, as evidenced in the summer of 1997 when a legislative committee convened to discuss their goal of providing more public access to public and private lands for hunters.[137]

III. ANALYSIS

A number of social and historical forces seem to be at work in the to-and-fro nature of section line hunting rights in South Dakota. First, the dispute over public access to section line rights-of-way for the purpose of hunting is rooted, at least in part, in the "East River/West River dichotomy" which troubles the state.[138] South Dakotans have long recognized that their state is divided, roughtly at the Missouri River, into two distinct geographical and cultural regions.[139] While West River interests are shaped by ranching, low populations and conservative values, East River is more cosmopolitan, with an economy driven by service industries and agriculture.[140] West River country is bisected by far fewer roads, and many

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134. 1996 S.D. Laws, ch. 252, § 1 (1996).

135. S.D.C.L. § 41-9-1.3 (Supp. 1997).

136. *See* MAGEDANZ, *supra* note 51, at 8. 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. *Id.*

137. Pries, *supra* note 60, at 1.

138. *See* Pries, *supra* note 60, at 1-2 (stating that the restrictions of access to private lands for hunting have historically been implemented at the urgings of West River interests).

139. LINDA HASSELSTROM, ROADSIDE HISTORY OF SOUTH DAKOTA 2-5 (1994) [hereinafter Hasselstrom].

140. *Id.* at 4-5. Hasselstrom notes the observations of Pat Halley, a Boston writer:

> The Scandinavian-American residents of East River, said Halley, feel they are more sophisticated than those in West River; they drink a lot of black coffee, "root for the Minnesota Twins and Vikings, and wear seed caps and call themselves farmers if they are involved in agriculture." They view the western end of the state as "a nice place to visit."
>
> By contrast, West River residents see those in the other end as "snobby." By heritage western European, West River folks drink their coffee with cream and sugar, "root for the Denver Broncos and wear cowboy hats and call themselves ranchers if they're involved in agriculture." They think of the eastern end of the state "as a place they'd rather not visit."

Id.

section lines in the vast ranch holdings are improved only to the extent that the landowner's trucks and machinery have left tracks across the prairie landscape.[141] East River country is more densely populated, with most of its section lines forming more or less improved highways. Because of the divergent interests in each half of the state, a single policy for section line hunting has proven difficult.[142]

Second, the fairly recent successes of commercial hunting operations in the state have to some degree fueled the intensity of the discourse.[143] Some commercial hunting operations are now able to charge as much as $200 a day per hunter.[144] As commercial hunting becomes more profitable, fewer private lands remain open to hunters, and the commercial operators gain a greater stake in seeing non-paying members of the public excluded.[145]

How much these commercial and geographical factors influence the legislative and judicial decision-making process is unclear, but it may be noteworthy that the state lost in both *Peters* and *Tracy*, reversed first on its indictment of Leo Peters for trespassing, then on its charge of hunter harassment.[146] While the "unimproved" standard articulated in *Peters* might have sustained a finding that the Ambach party had crossed into private lands when they abandoned their vehicle and waded across a ravine, the court seized the opportunity to modify *Peters* in order to find that the Ambach party was not lawfully hunting when they encountered the commercial goose pit operators.[147] In the process, the court further reduced

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141. *See* HASSELSTROM, *supra* note 139, at 246 (noting that Meade County in western South Dakota is larger than Delaware and Rhode Island combined, yet is dotted by just fifteen post offices). Burton C. "Cap" Mossman's Diamond A Ranch in West River at one time covered more than a million acres, including an entire county. *Id.* at 240.

142. *See* HASSELSTROM, *supra* note 139, at 2. Hasselstrom writes:

> Though ranchers and farmers are lumped together under the term "agriculture," their approaches have been utterly different. When cattle ranchers arrived, they did little to change the nature of the plains, but farmers broke up the sod with their plows. . . . From this difference, often unacknowledged, springs many of today's differences of opinion on the use of land. Throughout the state's history, many folks have been in favor of drawing a dividing line at the 100th meredian, midway between the eastern and western state boundaries, to resolve the conflicting interests of eastern farmers and western ranchers.

Id. A law which was repealed in the 1970's singled out East River in prohibiting big game hunting on posted lands. S.D.C.L. § 41-9-3.1 (1972), *repealed by* 1973 S.D. Laws ch. 269 § 3.

143. MAGEDANZ, *supra* note 51, at 1.

144. 8 DAKOTA OUTDOORS HUNTING DIRECTORY 1997-'98, at 33. The operator who quoted this per diem price for pheasant hunting provides a guide, hunting dogs, and bird processing, but not food and lodging. *Id.*

145. *See id.* at 8-53 (listing over one hundred and ninety private individual hunting operations and preserves specializing in upland game and waterfowl hunting in South Dakota, many boasting of thousands of acres of land). "What is often lacking for hunters — especially in parts of the state that are unfamiliar to them — is a destination where they know they won't be denied access." SOUTH DAKOTA 1997 WALK-IN AREA ATLAS 2 (1997) (referring to South Dakota as a "'mostly private' land of infinite variety").

146. *Tracy*, 539 N.W.2d at 332; *Peters*, 334 N.W.2d at 223.

147. *Peters* stated that "any alteration" sufficed to meet the definition of "improved" in S.D.C.L. section 41-9-1.1 so that hunting would be allowed along section lines unless it was "totally unimproved." *Peters*, 334 N.W.2d at 221, 222. *Peters* found the section line in question to be improved based on the removal of rocks and compacted tracks following the fenceline, some deeper than the length of an expanded shotgun shell. *Id.* at 220, 221. Twelve years later in *Tracy*,

the number of right-of-ways which would be open to public hunting. The current definition of open section lines offered by the legislature has yet to be judicially interpreted, but its practical effect will probably lie midway between the *Peters* and *Tracy* holdings.[148]

Furthermore, a distinction which thus far has escaped the courts and legislature has been that which exists between upland bird hunting (primarily for pheasants) and waterfowl hunting (geese).[149] As has been noted, the debates arising from goose hunting activities along section lines usually have their inception in scenerios in which a hunter has been lying hidden along roadless section lines waiting for geese to pass overhead.[150] Pheasant hunting, conversely, usually involves what is classically referred to as road hunting. Both goose and pheasant section line hunters can find themselves competing with abutting commercial hunting operators for game, but much of the rhetoric often focuses on the importance of road hunting as a South Dakota tradition. Both *Peters* and *Tracy*, however, involved section line goose hunters.[151] In the context of these disputes, hunters point out that individual operators and landowners cannot claim a superior property interest in the wild birds, which vests in the people of the state generally.[152] Future law making may very well draw a distinction between pheasant hunting and goose hunting in defining when and under what conditions section line hunting is permissable.

The South Dakota legislature's attempt at forging a compromise between landowners and hunters by allowing the definition of section line hunting rights to turn on whether the way is "improved" has proved largely unworkable. Even under the latest statutory explanation of the term, faced with a rambling pair of ruts following some forsaken West River section line, who could say whether the section line was intentionally adapted to enhance the natural terrain's utility for vehicular traffic, or to permit travel by vehicle where it had not previously been possible? Certainly not a judge or jury, and least of all a hunter unfamiliar with the landscape. Moreover,

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the Ambach party had left their vehicle next to an impassable slough and continued on foot. *Tracy*, 539 N.W.2d at 330. The hunters could not have reached their hunting "spot" without abandoning the section line easement and trespassing on the landowner's field. *See id* at 333-334. Seemingly, therefore, the court could have found that the Ambach party was not lawfully hunting since they had crossed "totally unimproved" lands without "any alteration." *See id; Peters*, 334 N.W.2d at 221, 222. Nevertheless, the court took the opportunity to narrow *Tracy's* "any alteration" definition with a definition of improvement as "an intentional enhancement which will allow vehicular travel where not previously possible." *Tracy*, 539 N.W.2d at 331.

148. MAGEDANZ, *supra* note 51, at 8.

149. *But see Peters*, 334 N.W.2d at 222-223 (stating that restricting the definition of "improved" would "put into question the public's right to hunt on hundreds of miles of ungraded section line grass roads in South Dakota that are regularly travelled during *pheasant* season") (emphasis supplied).

150. *See supra* notes 51-58 and accompanying text for a description of the hunting methods employed for waterfowl and upland game birds.

151. See *supra* notes 85-117 and accompanying text.

152. *See* Missouri v. Holland, 252 U.S. 416, 434, 40 S.Ct. 382, 384 (1920) (writing for the majority, Holmes said: "Wild birds are no in the possession of anyone; and possession is the beginning of ownership."); *Reis*, 1996 S.D. ¶ 29, 550 N.W.2d at 84 (Gilbertson, J., concurring) (stating that game is deemed the property of the state).

S.D.C.L. section 41-9-1.3 raises the question of whether a section line remains improved if the landowner fills in or blocks a previously passable section line.[153] If landowners can simply deconstruct an intentional adaptation and thus bring the section line into the "unimproved exception" to the general rule permitting section line hunting, the compromise is largely ameliorated. Even if the law responded by declaring it would not recognize such attempts to frustrate the public right, individual hunters in the field would sooner turn away from filled-in section lines than venture forth and risk a trespass prosecution.[154] For the foregoing reasons, this comment suggests that the "improved" and "commonly used" statutory language be abandoned. While this solution tilts the equation decidedly in favor of hunters at the expense of landowners and commercial hunters who would see a diminishment in their right to exclude along section line right-of-ways, it poses a bright-line definition which takes into account the downward spiral of access hunters in the state have experienced with the advent of commercial hunting.[155]

Whatever the legal outcome of the definition of these public rights of access and use along section lines in South Dakota, it will ultimately rest with individuals to resolve the debate. Because of the vast reaches of land on which these disputes occur. recourse to legal enforcement or remedies can be, at best, a limited solution.[156] Instead, the future of these ribbons of public hunting access will depend in large measure upon the good sense. give-and-take, and common courtesy which individuals landowners and hunters have, for the most part, heretofore displayed.[157] In the end, it may be that "the safety of the people shall be their highest law."[158]

IV. CONCLUSION

The recent South Dakota Supreme Court decisions and legislative responses have highlighted the difficulty in defining whether section lines are open to public hunting based on a definition of common use or intentional improvements. While it is commonly accepted that property owners suffer a suspension of their right to exclude members of the general public from these statutory rights-of-way, much of the contemporary controversy has focused on if and when that right is subverted to the public's right to use

153. *See* S.D.C.L. § 41-9-1.3 (Supp. 1997).

154. See *supra* notes 69-84 for a discussion of trespass law in South Dakota.

155. This comment does not advocate deleting the exceptions for interestate highways, controlled access facilities, "highways within parks or recreation areas or within or adjoining public shooting areas or game refuges posted for restriction of an applicable use" as set forth by the Department of Game, Fish, and Parks. S.D.C.L. § 41-9-1.1 (Supp. 1997).

156. *Reis*, 550 N.W.2d at 83.

157. After the *Reis* trial, John Cooper, then head of the state's Game, Fish and Parks Department, was quoted as saying that the ultimate responsibility for access to section lines lies with the individuals who hunt there. Ron Schara, *South Dakota Judge Affirms Legality of Roadside Hunt*, STAR TRIBUNE (Minneapolis), Sept. 24, 1995, at 19C. *But see* MAGEDANZ, *supra* note 51, at 8 (stating that in section line hunting disputes, "[a] few people in both camps tend to exacerbate the situation and make compromise more difficult to achieve.").

158. CICERO, LAWS 467 (trans. by C.W. Keyes, 1928).

these easements of way for hunting. Allowing the answer to depend upon a mercurial definition of the state of these arbitrary lines in the landscape has resulted in an unworkable standard which ought to be abandoned. While future lawmaking and judicial interpretation can be sure to follow, resolution may ultimately lie in extralegal denouements.