Their Way?  
Your Way? or the  
“RIGHT OF WAY”!  

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Managing the Right of Way

- State statutes governing twp roads & R-O-W
- What is authorized within the R-O-W
- What is NOT authorized within the R-O-W
- What is discretionary within the R-O-W
- Corrective Action to R-O-W violations
Township Road Defined by State statutes

- **31-13-1 Township road system-** Township board responsible for townships roads. The board of township supervisors shall construct, repair, and maintain all of the township roads within the township (includes full, minimum maintenance, and unimproved section lines)....

(Meaning only the twp supervisors have the authority and responsibility- not the landowner or county)
31-13-1. Township road system--Township board responsible for township roads. The board of township supervisors shall construct, repair, and maintain all of the township roads within the township. The township road system consists of section line roads; judicially declared roads; roads impliedly accepted by the township through routine performance of certain maintenance activities, such as grading, graveling and snow removal, and accepting funds from the county pursuant to §§ 32-11-4.1, 32-11-6, and 32-22-35 for a period of at least fifteen years; and any other roads designated by resolution of the board as being on the township road system. A road may only be vacated through the process specified in chapter 31-3. Before a road may be added to the township road system, it shall meet the minimum requirements specified in §§ 31-18-2 and 31-13-4, unless the board, by resolution, waives this requirement.

Section line roads/ Twp roads Defined by State Statutes

- 31-18-1 Existence of section-line highways by operation of law. There is along every section line in this state a public highway located by operation of law...

- 31-18-2 Width of highways- Side from which taken. Every statutory section-line highway shall be 66 ft wide and shall be taken equally from each side of the section line...
31-18-1. Existence of section-line highways by operation of law. There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.

Source: SL 1870-1, ch 33, § 1; PolC 1877, ch 29, § 1; CL 1887, § 1189; RPolC 1903, § 1594; RC 1919, § 8519; SDC 1939, § 28.0102.

31-18-2. Width of highways--Side from which taken. Every statutory section-line highway shall be sixty-six feet wide and shall be taken equally from each side of the section line, unless changed as provided in this title, but nothing herein contained shall prevent the highway authority charged with the construction, reconstruction, or repair of any public highway along a section line from purchasing or condemning right-of-way for widening the highway to more than sixty-six feet or from purchasing or condemning more right-of-way on one side of the section line than on the other, provided they deem it necessary so to do in order to provide a better highway, to avoid destruction of trees or valuable buildings or to avoid unsuitable terrain.

Source: PolC 1877, ch 29, § 3; CL 1887, § 1191; RPolC 1903, § 1596; RC 1919, § 8519; SDC 1939, § 28.0105; SL 1953, ch 132.
Right of Way Statutes

• 31-32-1 It is unlawful for anyone to intentionally damage a highway or bridge. One cannot be allowed to dig up, remove, displace, break or in any way injure or destroy a public highway or bridge. (Class 6 Felony)

**Class 6 Felony has a maximum fine of $4000 fine and/or 2 years in prison.

(Examples might be: boring or cutting through a road without permission or intentionally driving through a closed road and further damaging it, etc)
Right of Way Statutes

• 31-32-3.1 No one can intentionally dump any material or cargo on or within the highway R-O-W (Class 1 misdemeanor)

• 31-32-7 No unauthorized person can injure, remove, destroy or otherwise alter a highway grade or fill, obstruct, or otherwise alter a ditch which drains a highway grade or otherwise injure a highway in any manner. (Class 2 misdemeanor)

**Class 2 Misdemeanor (lowest misdemeanor) carries a maximum fine of $500 and/or 30 days in county jail

Class 1 Misdemeanor carries a maximum fine of $2000 and/or 1 year in the county jail
Managing the Right of Ways...

• What is authorized within the R-O-W

  Utilities (electrical, communication, and pipelines authorized by state law)
  SDCL 31-26-1

  • Indemnity Requirement SDCL 31-13-55
  • Relocation of utilities SDCL 31-26-23
31-26-1. Application to board of county commissioners to erect poles and wires or to bury cable for electricity and telephone--Period covered by application--Regulation by Legislature.

31-13-55. Indemnity requirement for construction or survey work within road right-of-way. An organized township may require any person performing construction or survey work within any township road right-of-way which may damage such right-of-way to furnish an indemnity bond in a reasonable amount as determined by the township board to indemnify the township for any damage done beyond normal wear. However, if a registered professional engineer or a registered land surveyor is surveying land, as defined in § 36-18A-4, for an individual landowner of the township, the provisions of this section do not apply. **Source:** SL 1984, ch 213, § 1; SL 1987, ch 29, § 12.

31-26-23. Relocation or removal of electrical lines, communication lines, and pipelines--Procedural requirements. If any highway or public entity infrastructure is constructed or changed within the public right-of-way, the public entity or its representative shall notify any affected known utility that has electrical lines, communications lines, or pipelines and allow the affected utility to participate in a coordination meeting during the planning or design phase of the project, except as provided in this section. The meeting shall allow the public entity and affected known utility to discuss options to minimize construction delays, limit the impact of the construction on utility facilities, and to minimize or eliminate costs associated with any utility removal or relocation. No such option may cause the public entity to incur additional costs unless a written agreement is reached to have the affected utility pay for the additional costs incurred by the public entity.
If the public entity determines that coordination meetings will not be held due to the project scope and size, the public entity shall notify any affected known utility and allow the affected utility thirty days to submit written comments on the project.

After the coordination meetings or after the written comment period, the permit holder shall, upon ninety days notice in writing, remove or relocate the facilities at its own cost unless other arrangements have been mutually agreed upon in writing. If the public entity, in coordination with the utility, determines that winter weather conditions make removal or relocation impractical, the accrual of time within the ninety-day notification period shall be suspended until conditions make removal or relocation practical. If a utility's facility is discovered during construction that was not identified by the utility during the planning or design phase or during the written comment period if the public entity determines that a coordination meeting will not be held, the ninety-day notice is not required and the utility shall coordinate with the public entity to remove or relocate the facility as soon as practically possible for the project.

**Preferable location of utility lines is on the back slope closest to the property line.**
Poor placement of Utility Poles

**Numerous issues within right of way... Poor placement of utility pole- within clear zone. Also appears that fence is also within right of way.**
Managing the Right of Ways...

• What is allowed within the R-O-W

✓ Utilities (electrical, communication, and pipelines)

☐ Signage (MUTCD guidelines)
☐ Mailboxes (AASHTO guidelines)

**Signage design and placement per MUTCD- Manual on Uniform Traffic Control Devices

Mailbox design per AASHTO guidelines (American Association of State Highway and Transportation Officials)
MUTCD – Signs Crashworthy

• MUTCD - Section 2A.19 Lateral Offset
  ▪ 02 post-mounted sign and object marker supports shall be crashworthy (breakaway, yielding, or shielded with a longitudinal barrier or crash cushion) if within the clear zone.
Wood Sign Post

Small wood support is typically a 4 x 4 inch post.

Holes are needed for wood posts greater than 4 x 4 inches.

HOLE SIZE REQUIREMENTS

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Square Tube Sign Post

Two types of breakaway designs.
U-Channel Sign Post

Breakaway treatments for u-channel posts.
Mailboxes- approved and unapproved

**Mailboxes on breakaway bases are approved. However the mailbox reinforced with rocks and the mailbox within the utility pole would not meet the AASHTO guidelines. The unapproved mailboxes would be treated as obstructions because they pose serious safety hazards to a driver having to leave the road.**
Mailboxes not meeting AASHTO
Mailbox Protection ??
Solid Base – Crashworthy??
Managing the Right of Way...

• What is allowed within the R-O-W
  ✓ Utilities (electrical, communication, and pipelines authorized by SDCL 31-26-1)
  ✓ Signage/Mailboxes (MUTCD & AASHTO)

❑ Approved Approaches (Limitations)
  • Additional require permit 31-24-3
    – Most counties/twp have specific requirements that must be signed in advance of construction
  • Approach cannot interfere with drainage 31-2-7
31-24-3. Limitation on number of farm entrances--Additional entrances at owner's expense. The owner, as a matter of right, is not entitled under § 31-24-1 to the construction of more than one farm entrance on any one tract or parcel of land at the expense of the public authority whose duty it is to maintain the highway. However, the owner may at the owner's expense upon making application to and receiving written consent of the authority construct other entrances if the entrances are constructed at the place and in the manner designated by the authority in its written permit.


31-24-6 Entrance to existing highway at owner's expense--Permit--Construction in accordance with approved plans. If any public highway as already constructed is of such character as to deprive the owner of the abutting land of easy and convenient access from the owner's land to the highway, the owner of the land may, at the owner's expense, except as provided by chapters 31-7 and 31-8, construct an entrance to the abutting land. However, no entrance may be constructed until the landowner has obtained a permit from the authority whose duty it is to maintain the highway for the construction of the entrance. The entrance shall be constructed in accordance with plans approved by the authority. The authority shall fix the width and location of the entrance and the entrance shall be constructed in accordance therewith.

**31-24-7. Interference with drainage**--Obstruction of right-of-way. No entrance may be so constructed pursuant to § 31-24-6 as to interfere with the proper and necessary drainage of the highway. No portion of the right-of-way of the highway other than that necessary for the entrance shall be occupied or used for business purposes.

**Source:** SDC 1939, § 28.0908 as added by SL 1941, ch 132; SL 2010, ch 145, § 119.

31-24-7. **Interference with drainage**--Obstruction of right-of-way. No entrance may be so constructed pursuant to § 31-24-6 as to interfere with the proper and necessary drainage of the highway. No portion of the right-of-way of the highway other than that necessary for the entrance shall be occupied or used for business purposes.

**Source:** SDC 1939, § 28.0908 as added by SL 1941, ch 132; SL 2010, ch 145, § 119.
Approach within intersection?
**Numerous problems with placement of this approach…**

This approach was constructed within an intersection and poses a serious safety hazard. It comprised of dirt with no gravel or base and lacks any culvert to allow drainage. Directly to the left of the approach is a culvert. Landowner states approach was there when land was purchased. He only improved it. However he did not seek permission to build it up. Had no authority to add material to ROW. The dirt approach will eventually erode and dam up the water causing drainage problems to the south of the intersection where there is a culvert. Having an approach within an intersection will also interfere with snow removal causing snow to build up and drift into the intersection.

31-32-7 **No unauthorized person** can injure, remove, destroy or otherwise alter a highway grade or fill, obstruct, or otherwise alter a ditch which drains a highway grade or otherwise injure a highway in any manner.

31-21-12 **Civil liability for obstruction of ditch.** Any person who shall dam up, obstruct, or in any way injure any ditch opened pursuant to this chapter shall be liable to the township or county in double the damages which shall be assessed by the jury or court trying the case for such injury.
Managing the Right of Ways...

• What is NOT authorized within the R-O-W
  – Obstructions in R-O-W
    • Trees/weeds/brush (SDCL 31-31-2)
    • Bales (SDCL 31-31-56)
    • Objects/ Debris
    • Farming the right of way
    • Fencing
    • Anything else that creates public hazard
      – Drainage ditches, trenches, irrigation pivots
31-31-2. Weed removal on township roads—duty of abutting landowner. The owner or occupant of any land abutting or adjoining upon township roads shall cut, remove, or destroy or cause to be cut, removed, or destroyed, grass, weeds, trees, and brush growing on or in the right-of-way of such roads, provided that such roads are left in such condition that any and all undergrowth thereby or thereon can be cut with a mower. A violation of this section is a petty offense.

31-31-3. Time for weed removal. Grass, weeds, trees or brush referred to in §§ 31-31-1 and 31-31-2 shall be cut, removed, or destroyed between the first day of September and the first day of October of each year, or between dates annually fixed by the board of supervisors.

31-13-56 Removal of baled or stacked foliage from township right of way by Nov 1.
38-22-22. Responsibility for cost of operations on publicly owned land. The responsibility for and the cost of controlling and eradicating weeds and pests on all lands or highways owned or supervised by a state agency or subdivision shall be upon the state agency or subdivision supervising such lands or highways, and paid out of funds appropriated to its use.

(It is the AG’s opinion in 1976 that this means the township is responsible for the “noxious” weeds in R-O-W and not the landowner)
**It is the AG’s opinion that townships are responsible for noxious weeds within the right of way. Below is the link e**

This link takes you to the attorney general’s opinion 76-1, which states specifically that the township is responsible for their weeds.


Here is an excerpt from Attorney William Janklow opinion in 1976:

It is my opinion that 31-31-2 does not authorize a township to require a landowner to control noxious weeds in township road ditches adjacent to his property. SDCL 31-31-2 cited above refers to "grass, weeds and brush." SDCL 38-22-22 and 24 cited above specifically refer to "noxious weeds" and it is the responsibility of the township in this instance to control such noxious weeds. SDCL 38-12-2 and 3 contain statutory definitions of what constitutes "noxious weeds."

It appears to me that the above cited statutes must be construed together yet giving effect so far as possible to the provisions of each section. It may be somewhat difficult to administer but it appears that control of noxious weeds is a matter for the township, whereas control and removal of grass, non-noxious weeds and brush growing within the right-of-way of township roads is a responsibility of the adjoining landowner.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL
31-32-16 A tree or other object which overhangs the roadway and is likely to cause damage or injury to those traveling the road is a public nuisance and remedies are provided to have it removed.

This may seem unlikely, but one incident occurred in SD where a combine swerved to avoid overhanging tree branches and went off the roadway and was damaged. A claim was filed!
Tree/Obstruction in ROW – Clear Zone
Tree Stump in Right of Way...
Hay Bales – In Ditch

**Ok until Nov. 1- then must be removed.**
Objects in Ditch
Farming the R-O-W
Intersection Sight Distance???
Farming Right of Way...
Farming R-O-W causes serious erosion...

**31-32-7 No unauthorized person can injure, remove, destroy or otherwise alter a highway grade or fill, obstruct, or otherwise alter a ditch which drains a highway grade or otherwise injure a highway in any manner. (Class 2 misdemeanor)
Fence in ROW/Ditch
Fence in ROW/Ditch
Other examples of public hazards...
Ditch altered for drainage
Drawing showing one half of roadway from center to left

Backslope is often steep on existing two roads. When alteration is done, 1V:5H is recommended according to SDDOT Local Roads Plan.

Foreslope recommended at 1V:3H and 1V:4H being ideal where possible per SDDOT Local Roads Plan.

3 ft. (example only)

A flat bottom ditch is recommended, very hard to build at less than eight feet.

The challenge here is working in a 66 ft R-O-W. One half of road top must be minimum 10 ft, foreslope at 1V:3H is 9 ft horizontal, and 8 ft for ditch bottom totals 27 ft. This leaves only 6 ft horizontal for the backslope to stay within 33 ft (half of the 66 ft R-O-W).
Correct solution

Recommend 1V:3H foreslope when any alteration is done

Recommended roadway profile after altering and deepening ditch. Can only be done by acquiring additional R-O-W
Ditch reshaped for drainage
Examples of serious public hazards...
Another example of a serious public hazard...
**This is a secondary road in a county with no organized townships. The road was actually moved over toward the adjacent landowner’s property (right of picture) and was maintained for over 20 years. However, the other portion of the section line (to the left if the picture) was never vacated. Therefore in this instance, the dedicated public ROW is substantially more than 66 ft.**

**31-3-1. Dedication to public by continuous use, work, and repair of road--Width--Obtaining right-of-way.** Whenever any road shall have been used, worked, and kept in repair as a public highway continuously for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.

Such highway shall be sixty-six feet wide and shall be taken equally from each side of the roadbed center line. Nothing herein contained may prevent the highway authority charged with the construction, reconstruction, or repair of any public highway from purchasing or condemning right-of-way for widening the highway to more than sixty-six feet or from purchasing or condemning more right-of-way on one side of the roadbed center line than on the other, provided they deem it necessary so to do in order to provide a better highway, to avoid destruction of trees or valuable buildings or to avoid unsuitable terrain.

**Source:** SDC 1939, § 28.0104; SL 1985, ch 232.
Managing the Right of Way

✓ State statutes governing twp roads & R-O-W
✓ What is authorized within the R-O-W
✓ What is NOT authorized within the R-O-W

☐ What is discretionary within the R-O-W?
  Drainage, tiling, manure draglines
Discretionary within R-O-W’s
Allowing Discretionary obstructions within R-O-W

• Must be board decision to authorize or deny conditional use of right of way

• Recommend signed agreement between landowner/tenant and township board of supervisors outlining requirements and conditions.

• Use Indemnity Bond (optional) SDCL 31-13-55

**Before authorizing or denying use of the township right of way for discretionary obstructions/use- make sure the board meets during an actual township board meeting and meets the open meeting requirements.**

Consider utilizing the counties’ conditional use permit (if available) or contacting an attorney for assistance.

If landowner/tenant refuses to sign a conditional use agreement, remind them you can require a indemnity bond for construction work within the right of way.
Managing the Right of Way

✓ State statutes governing twp roads & R-O-W
✓ What is authorized within the R-O-W
✓ What is NOT authorized within the R-O-W
✓ What is discretionary within the R-O-W

☒ Township Responsibility and Actions to be taken for R-O-W violations
Right of Way Statutes

• 31-32-10  Duty of governing body to give notice of dangerous road  (48 hours after receiving notice)

• 31-32-9  The governing agency has a duty to remove obstructions and repair damage to roads and streets and is authorized to recover the amount expended from the person who caused the damage.

• 31-32-8  Any township or other public agency may recover their losses from the person who damaged the highway or ditch which led to injury or obstruction.
What are some options for controlling the problem?

• Make an annual inspection of the road system and note the problems within the R-O-W.

• Consider a carefully worded mailing to residents and landowners explaining the problems and the liability that is created for the township and the expense of taking care of these matters. Explain it ultimately is paid by their tax dollars. Many form letters available through SDATAT.

OR

• Notify landowners (in writing) who are violators and let them know what the township expects them to do. Be reasonable and act according to statute. Cease and desist letters can be also sent after the violation of obstruction or farming the ROW has occurred.
Options for controlling the problem (continued)

- Try to be proactive and communicate the need to keep the r-o-w’s clear.

- Be **consistent** and **uniform** in how you handle similar situations.

- Don’t threaten and not carry through. Townships are responsible for enforcement.

- Contact the local sheriff to document/file any criminal activities and forward to State’s Attorney.

- May be necessary to contact attorney or civil penalties.

- Vacation of road (optional)
**Avoid personal biases** in all of your decisions as a board. Do not pick and choose who you require to adhere to the law while ignoring others who are also in violation. Be consistent and uniform throughout the township while doing what is best for your entire township and not just some of your neighbors.

Remember you and your township can be sued, so make sure that “Due Process” takes place. Give the landowners sufficient notice and time to mitigate the violation/problem identified by the board and document everything properly.

8-2-1. General corporate and regulatory powers. Each organized township in the state is a body corporate and has power:
**1) To sue and be sued;

(2) To acquire, by purchase, condemnation, or other lawful means, real property within or without the limits of the township, necessary or convenient for township purposes, or for the exercise of the powers granted to the township;

(3) To make such contracts and purchase and hold such personal property as may be necessary for the exercise of its corporate or administrative powers or for the protection of the property of its inhabitants, including the purchase of or contracting for fire-fighting equipment or protection;

(4) To pass bylaws or ordinances for the government of such township and for the protection of the lives and property of its inhabitants, and to enforce the same in its corporate name before any magistrate;

(5) To make such orders for the disposition, regulation, or use of its corporate property as may be deemed by the board of supervisors conducive to the best interests of the inhabitants.

Source: SL 1872-3, ch 51, § 8; PolC 1877, ch 23, § 7; CL 1887, § 711; SL 1901, ch 200, § 1; RPolC 1903, § 1003; RC 1919, § 6044; SL 1919, ch 347; SL 1925, ch 290; SDC 1939, § 58.0201 (1) to (5); SL 1941, ch 365; SL 1974, ch 153, § 3.
Specific Procedures for Mitigating right of way issues...

- Tree Removal
- Mowing weeds/grass
- Damage to ditch (ditches, trenches, drainage)
- Damage to road (cutting thru road, drainage)
- Farming the right of way (intentional damage to ditch)
- Obstructions (fences) to be removed within r-o-w
- Vacating section lines

**Limited number of handouts are available.**

- Can also access all handouts on our web at www.sdtownships.com under the “Membership Only”
  Password protected. If you are a member, you can call the office at 605 353-1439 and request the password.