LETTER OPINION
2001-L-21

June 26, 2001

Mr. Duane Mullenberg
Chairman
Foster County Water Resource District
PO Box 15
Carrington, ND 58421-0015

Dear Mr. Mullenberg:

Thank you for your letter asking whether the water resource board can order the removal of an unauthorized dam constructed in a watercourse and, if so, whether the board would be liable for downstream property damages that may result. The dam retains more than twelve and one-half acre-feet of water.

Since 1935 N.D.C.C. § 61-16.1-38 and its predecessors have required state approval to construct dams, dikes, or other water control devices. 1935 N.D. Sess. Laws ch. 228, § 9. I assume by "unauthorized" you mean the dam was constructed after 1935 without the necessary approval.

Section 53 of chapter 61-16.1 authorizes a water resource board to order the removal of a dike, dam, or other water control device capable of retaining more than twelve and one-half acre-feet of water if the board determines that the structure was constructed without complying with N.D.C.C. title 61 or any rules adopted by the board. If the landowner does not remove the dam within the time set by the board, but not less than 15 days, the board may remove the dam and assess all or a part of the costs against the property of the landowner responsible.

In addition to the statute that regulates dam and dike construction, N.D.C.C. § 61-01-07 prohibits any person from illegally obstructing a watercourse. This statute was enacted in 1911. 1911 N.D. Sess. Laws ch. 327, § 1. A "watercourse" exists

> if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character.

N.D.C.C. § 61-01-06.

Section 51 of the chapter provides that if a water resource board determines that a landowner has negligently obstructed a watercourse, the board may order its removal. The procedure to order removal is similar to that provided for the removal of unauthorized dikes, dams and other water control devices.

The question presented by the Foster County Water Resource Board is quite similar to the question decided in Douville v. Pembina County Water Resource District, 612 N.W.2d 270 (N.D. 2000). In Douville several landowners constructed dikes between 1969 and 1974 without obtaining the permits or approvals required under the predecessor statute to N.D.C.C. § 61-16.1-38. The dikes caused downstream lands to flood in years of high run-off. More than 25 years after the dikes were constructed, several downstream landowners filed complaints with the water resource board alleging that the dikes were illegal and should be removed. The board determined the dikes were illegal and ordered them removed. Douville, 612 N.W.2d at 272-273.

Both the district court and the North Dakota Supreme Court affirmed the water resource board's decision ordering the dikes to be removed. Douville, 612 N.W.2d at 273 and 277. On appeal to the Supreme Court, the owners of land on which the dikes were located argued that they had acquired a prescriptive easement to flood downstream land and therefore the dikes should not be removed. The Supreme Court said that what they sought went beyond a mere flowage easement upon the land of downstream landowners. What the landowners were asserting was the right to keep in place dikes that were erected in violation of state law. Id. at 275-276. The Court held that N.D.C.C. § 61-16.1-53 gave the water resource board the power to remove any dike established or constructed contrary to N.D.C.C. title 61 or rules adopted by the board, irrespective of any private right to flood downstream land. Douville, 612 N.W.2d at 276.

The Court recognized that the authority granted to water resource districts to regulate water management, including the removal of unauthorized water control devices, was an exercise of the state's police power to promote the health, safety, and welfare of the public. Id. quoting N.D.C.C. § 61-16.1-01. It said that the maintenance of dikes constructed in violation of state law invokes the police powers of the state and is wholly separate from the competing private rights of upstream and downstream landowners. The Court held that regardless of whether the landowners had acquired a prescriptive right against the downstream landowners, they could not acquire a prescriptive right to prevent the state from exercising its authority to regulate and control the use of public waters for the benefit of the public and they could not defeat the state's authority to protect the health, safety, and

welfare of the public by claiming a prescriptive right to maintain dikes constructed in violation of state law. Douville, 612 N.W. 2d at 276.

According to the facts described in your letter, an almost identical situation exists as existed in Douville. In your case, a dam was constructed without the permit or authorization required by the predecessor of N.D.C.C. § 61-16.1-38. Regardless of the length of time the dam has been in place, or any rights downstream landowners may have against the upstream landowners as a result of the construction of the dam, under the rationale of Douville, N.D.C.C. §61-16.1-53 gives the water resource board the power to have it removed.

You also ask whether the water resource board would be liable for any downstream damages that may occur if it orders removal of the dam. I assume you are referring to effects on the land downstream that will now be inundated by water no longer retained by the dam, and so I will limit my discussion to that issue.

Although the North Dakota Supreme Court has not addressed whether a prescriptive right can be obtained to be free of drainage, courts in at least a couple of other states recognize this right. The Illinois Supreme Court held that by constructing a barrier to the natural drainage, the owner of the downstream or servient land may, if the obstruction is maintained for the prescriptive period, obtain a prescriptive right to be free of the drainage. Montgomery v. Downey, 162 N.E.2d 6, 10 (Ill. 1959). South Dakota also recognizes this doctrine. Kougl v. Curry, 44 N.W.2d 114, 116 (S.D. 1950).

Easements are property within the meaning of the constitutional provision prohibiting the taking of private property for public use without just compensation. U.S. v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); Cummings v. City of Minot, 271 N.W.2d 421 (N.D. 1936). North Dakota recognizes that easements can be acquired by prescription. Nagel v. Emmons County North Dakota Water Resource District, 474 N.W.2d 46, 48-50 (N.D. 1991).

Section 7 of chapter 61-01 prohibits unlawfully obstructing a watercourse. Section 38 of chapter 61-16.1 and its predecessors prohibit the construction of dams, dikes, and other water control devices without state approval. The question becomes whether a compensable property right can be acquired based on an action that violates state law.

As discussed above, the authority granted to water resource districts to regulate water management, including the construction of dams, dikes, and other water control devices, is an exercise of the state's police power to promote the health, safety, and welfare of the public. Douville, 612 N.W.2d at 276. Douville held that the landowners who constructed dikes in violation of state law could not acquire a prescriptive right to prevent the state from

exercising its authority to regulate and control public waters for the benefit of the public. Id. Further, Douville held that the landowners could not defeat the state's authority to protect the health, safety, and welfare of the public by claiming a prescriptive right to maintain dikes constructed in violation of state law. Id.

Douville did not discuss the issue of the water resource board's liability for ordering the removal of dikes. The Court did cite as authority for its decision cases holding that no lapse of time can legalize a public nuisance amounting to an obstruction of a public right and that no prescriptive right can be acquired to encroach on public streets. Douville, 612 N.W.2d at 276.

In Lemer v. Koble, 86 N.W.2d 44 (N.D. 1957), a downstream landowner brought a suit for damages and to enjoin the township from discharging surface water through a culvert. The road was reconstructed in 1931 without a culvert. The township board installed a culvert in 1954 after a heavy rain fell. The board inspected the road and found that the water threatened the integrity of the road and that the road was damming water which otherwise would have flowed naturally over the downstream landowner's land. Id. at 47.

Although the road had not had a culvert in it for 23 years, the issue of whether the downstream landowner had acquired a prescriptive right to be free from drainage was not mentioned. The Court said, however, that the township had a mandatory duty to inspect roads and make provisions for culverts where it deems necessary. Lemer, 86 N.W.2d at 47. The Court stated that the township had a duty to provide drainage for any water that accumulated in the ditches along the highway to prevent the water from overflowing onto adjoining lands and that injured parties could compel them to fulfill that duty. Id. at 47-48. The Court said it was unlawful under the predecessor of N.D.C.C. § 61-01-07 for the township to allow the highway grade to obstruct the natural drainage or watercourse. Id. at 47. Because the township had a duty to install the culvert and to provide an outlet for the natural drainage of surface water, the Court found that the downstream landowner had no basis to object to the flows through the culvert. Id. at 48.

The Court also addressed the damage claim. Because natural drainways must be kept open to carry water into streams and the lower estate is subject to a natural servitude for that purpose, the downstream landowner was not entitled to damages for any of the water that naturally came onto his land through the culvert. Id. at 47-48.

In Knodel v. Kassel Township, 581 N.W.2d 504 (S.D. 1998), a downstream landowner plugged a road culvert to stop a neighbor's surface water from draining through his property. Four decades later the township, when it became aware that the culvert had been plugged, decided to unplug it. The downstream landowner sued to stop the township. Among other things, the landowner claimed that he had acquired a prescriptive right to be

free from the flow of surface water from the neighbor. Although the South Dakota Supreme Court had previously recognized that a prescriptive right can be acquired to be free from upstream drainage, and the landowner specifically raised it on appeal, the Court found untenable the landowner's argument that he was entitled to farm a lakebed area by forcing a higher landowner to retain water. Weighing heavily in the Court's decision was the township's mandatory duty to maintain and repair roads and culverts and to reasonably accommodate the area's natural drainage. The Court said what the landowner sought would deprive another landowner of a superior right and subvert a township's statutory duties. Id. at 505-510.

While Douville and Lemer are not directly on point, a logical extension of these cases might be that because a landowner cannot obtain a right to violate a state law creating and protecting public rights, no property right can be affected by the enforcement of such a statute. Thus, no property right will be taken for which compensation under the constitution must be made. Under this rationale, the board would not be liable under a takings or inverse condemnation claim by removing the obstruction and allowing the drainage of the water that would otherwise have flowed naturally along the watercourse.

A final determination of liability can only be made by the courts. Concerns similar to yours have been expressed in the past by other water resource boards in the performance of their statutory responsibilities. For example, a concern was expressed by a water resource district regarding potential litigation from downstream landowners who objected to the removal of an obstruction from a culvert. Letter from Attorney General Nicholas Spaeth to Joe Harbeke (Dec. 28, 1988). Then Attorney General Spaeth stated, "compliance with the statutory procedure … provides the board with some measure of protection in an attempt to hold the board liable for any damages subsequently occurring. Additionally, action by the board in compliance with the advice of its legal counsel (i.e., the Attorney General) provides the board with an added measure of liability protection." While there is no guarantee that a lawsuit will not result from action taken by the board, "legal protection is provided to those persons who act in compliance with such statutes as opposed to actions taken in contradiction to statutes." Id.[1]

Sincerely,

[1] See State ex rel. Johnson v. Baker, 21 N.W.2d 355, 364 (N.D. 1945) (if officers of the state follow the advice of the Attorney General, even though the opinion given is later held to be erroneous, they will be protected by it; if they do not follow this course, they will be derelict to their duty and act at their peril).

Wayne Stenehjem
Attorney General

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