

LETTER OPINION
2000-L-57

<PAGE NAME="p.L-57">April 18, 2000

Ms. Kathleen K. Trosen
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Dear Ms. Trosen:

Thank you for your letter asking which political subdivision has authority to install culverts in county and township roads. You also asked whether a water resource district has the authority to order the repair of a culvert or the removal of debris from a culvert and if so, how that authority may be enforced and about a water resource district's liability for its actions.

In Kadlec v. Greendale Township Bd. of Township Supervisors, 583 N.W.2d 817, 822 (N.D. 1998), the North Dakota Supreme Court concluded that a township, and not a water resource district, has the authority to decide whether to put a culvert in a township road. In reaching this conclusion, the court reviewed prior decisions in which it had ruled that townships have the authority to install culverts in township roads when necessary to preserve a natural drainway for surface waters. Id. at 820. In addition, the court found N.D.C.C. § 24-06-01, which gives townships general supervision over township roads, as well as N.D.C.C. § 24-03-06, which imposes a duty on the board of township supervisors to construct or reconstruct roads in a manner that does not block the natural flow and drainage of surface waters, give the township the decision making authority to control the placement of culverts. Id. at 821-822. See also Ness v. Ward Co. Water Resource Dist., 585 N.W.2d 793, 797 (N.D. 1998) (while the Legislature envisioned townships and water resource districts working together on decisions relating to the placement of culverts, the township has the decision making authority to install culverts to preserve the natural drainage of surface waters).

The court in Kadlec noted, however, that the township does not act in a void. It has the responsibility to notify other townships affected by the insertion of a culvert that will increase surface water flow in those townships; certain decisions of townships may be appealed to the water resource district; the township must give notice of certain activities relating to the placement of culverts to the water resource district; water resource districts may advise the township; and townships must cooperate with water resource districts in the <PAGE NAME="p.L-58">installation, modification, or construction of culverts in order to achieve appropriate sizing and maximum consistency of road openings. Kadlec, 583 N.W.2d at 821.

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The opinion in Kadlec addressed, as between the township and the water resource district, which had the authority to install a culvert in a township road. Counties have responsibilities and duties regarding county roads that are similar to townships. N.D.C.C. § 24-05-17 gives the board of county commissioners general supervision over county roads. N.D.C.C. § 24-03-06 imposes upon the county the same duty imposed on townships not to construct or reconstruct roads in a manner that blocks the natural flow of water. The North Dakota Supreme Court has ruled that the boards of county commissioners are responsible for the county road systems and that this responsibility includes the authority to install culverts and to make the decisions about where culverts should be placed. Olson v. Cass County, 253 N.W.2d 179, 183 (N.D. 1977). Based on the court's rationale in Kadlec, 583 N.W.2d 817, it is my opinion that boards of county commissioners, and not water resource districts, have the authority to decide whether to install culverts in county roads. In sum, the authority to install culverts beneath township or county roads rests with the township board of supervisors or the board of county commissioners, respectively.

The duty to install a culvert extends to maintenance of the culvert. "[I]f the township has the duty to provide a drain for surface waters, it has the duty of maintaining such drain." Rynestad v. Clemetson, 133 N.W.2d 559, 565 (N.D. 1965). The Attorney General has opined that this duty to maintain extends to township road approach crossings and drainage appurtenances, such as culverts. Letter from Attorney General Nicholas J. Spaeth to Earle R. Myers (Aug. 28, 1986). Similarly, when other entities (the Department of Transportation or the county) have a duty to install a culvert, that entity also has a duty to maintain the culvert.

You also asked whether a water resource district has the authority to order the repair of a culvert or the removal of debris from under, within, and around the culvert. Water resource districts have broad authority to control waters within their jurisdiction. Kadlec, 583 N.W.2d at 821. A water resource district has express statutory authority to "[o]rder or initiate appropriate legal action to compel the entity responsible for the maintenance and repair of any bridge or culvert to remove from under, within, and around such bridge or culvert all dirt, rocks, weeds, brush, shrubbery, other debris, and any artificial block which hinders or decreases the flow of water through such bridge or culvert." N.D.C.C. § 61-16.1-09(16).

<PAGE NAME="p.L-59">Words in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, and any words explained in the North Dakota Century Code are to be understood

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as explained. N.D.C.C. § 1-02-02. The words "hinder" or "decrease" are not defined in N.D.C.C. ch. 61-16.1, and are therefore to be understood in their ordinary sense. "Hinder" is defined as "[t]o get in the way of; hamper . . . [t]o obstruct or delay the progress of." The American Heritage Dictionary 613 (2d coll. ed. 1985). Synonyms for "hinder" include hamper, impede, retard, encumber, obstruct, block, dam, and bar. Id. "Decrease" is defined as "[t]o grow or cause to grow gradually less or smaller." Id. at 373. This office has interpreted N.D.C.C. § 61-16.1-09(16) as giving a water resource district the authority to take action to remove a plug from a culvert where the plug resulted in obstructing flows through the culvert. Letter from Attorney General Nicholas J. Spaeth to Joe Harbeke (Dec. 28, 1988).

The purpose of N.D.C.C. § 61-16.1-09(16) is to ensure that culverts and bridges do not fall into a state of disrepair or become blocked by debris, natural growth of vegetation, or any other artificial block in such a manner that the flow of water becomes hindered or decreased resulting in flooding of upstream lands. This is consistent with the principles that roads are not to act as dams, N.D.C.C. § 24-03-06, and that the entity responsible for the road has a mandatory duty to not construct or reconstruct roads in a way that obstructs the natural flow and drainage of surface waters in order to prevent overflowing onto adjacent lands. Huber v. Oliver County, 602 N.W.2d 710, 715 (N.D. 1999) (citing Ness v. Ward County Water Resource Dist., 585 N.W.2d at 796); Kadlec, 583 N.W.2d at 822; Viestenz v. Arthur Township, 129 N.W.2d 33, 39-40 (N.D. 1964); Lemer v. Koble, 86 N.W.2d 44, 47-48 (N.D. 1957); and Viestenz v. Arthur Township, 54 N.W.2d 572, 575 (N.D. 1952)).

Thus, while the entity responsible for the road has the authority and duty to install culverts, water resource districts have the authority to order or take other action necessary to ensure culverts do not become obstructed resulting in the flow of water being hindered or decreased. This includes the authority to order the removal of debris from under, within, and around the culvert. If a culvert falls into a state of disrepair in such a manner that the flow of water is hindered or decreased, the water resource district has the authority pursuant to N.D.C.C. § 61-16.1-09(16) to order the removal of, or take other legal action to remove, the hindrance or obstruction. Such action may logically include repair of the culvert.

You have also inquired what would constitute "appropriate legal action to compel the entity responsible" to clean out the culvert. Some options are suggested below; however, there may be other avenues of <PAGE NAME="p.L-60">procedure, depending on the facts of a particular case. One option is to initiate enforcement proceedings by letter

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setting out the requirements and provisions of state law, with a request for voluntary compliance so that formal proceedings may be avoided. If the letter does not bring about compliance activity, the water resource district could issue an order directing compliance. N.D.C.C. ch. 61-16.1 does not elaborate on the procedure to be followed in issuing an order. Presumably, some fact-finding would be involved and recited in the order. Orders issued by some state agencies commonly include a brief recital of the relevant facts and legal authority for the order, as well as the action to be taken to remedy the violation. A person aggrieved by an order of the water resource district may appeal to district court. N.D.C.C. § 61-16.1-54.

If the respondent entity neither complies with the order nor appeals the order, the board may consider bringing an action in district court alleging the issuance of the order and respondent's noncompliance, and asking the court to enforce the board's order. This type of action has been used by administrative agencies to enforce administrative orders to pay a fine. If successful, the board would be able to invoke the enforcement powers of the district court, which are broader than those of the board.

Another option may be to petition the court pursuant to N.D.C.C. ch. 32-34 for a writ of mandamus against the entity responsible for maintenance of the culvert. Yet another option in some circumstances would be to lodge a complaint with the state's attorney. N.D.C.C. § 61-16.1-63 declares that if no other criminal penalty is specifically provided, violation of the provisions of N.D.C.C. ch. 61-16.1 is a class B misdemeanor.

In a telephone conversation with an assistant attorney general you also expressed concerns regarding the water resource board's potential liability. A similar 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 J. Spaeth to Joe Harbeke (Dec. 28, 1988). Then Attorney General Spaeth stated that "compliance with the statutory procedure provided by N.D.C.C. § 61-16.1-09(16) 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. See State ex rel. <PAGE NAME="p.L-61">Johnson v. Baker, 21 N.W.2d 355, 364

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(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).

Sincerely,

Heidi Heitkamp
Attorney General

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