

**LETTER OPINION
2001-L-27**

July 19, 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 about a prescriptive right to maintain a dam. You stated that a dam was constructed at the outlet of Russell Lake in Foster County approximately 38 years ago. It recently washed out and the water resource district would like to reconstruct the dam. A permit was not obtained when the dam was originally constructed. One of the landowners whose land would be inundated by water held back by the reconstructed dam has refused to give the water resource district an easement. You ask whether there may be a prescriptive right to continue to maintain the dam at its original elevation and storage capacity.

In 2001 N.D. Op. Att'y Gen. L-21, issued to the Foster County Water Resource District in June, I answered the question of whether the water resource district would be liable for downstream property damages that might occur if the district removed a dam constructed without the approval required by state law. The dam had been in place for more than 20 years. The issue was whether the downstream landowners had acquired a prescriptive property right to be free from having upstream water drained onto their property for which the district would have to compensate if the dam were removed.

The statute addressed in the June 2001 opinion, i.e., N.D.C.C. § 61-16.1-38 and its predecessors, is the same statute applicable to the dam you are proposing to reconstruct. 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.

In Douville v. Pembina County Water Resource District, 612 N.W.2d 270 (N.D. 2000) the North Dakota Supreme Court upheld the water resource district's decision ordering

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the removal of dikes that had been constructed more than 25 years earlier without the state's approval as required by the predecessor of N.D.C.C. § 61-16.1-38. The Court held that landowners who constructed dikes without obtaining the approval required by N.D.C.C. § 61-16.1-38 and its predecessors could not obtain a prescriptive right to prevent the state from exercising its authority to regulate and control public waters for the benefit of the public. Id. at 276.

In Lemer v. Koble, 86 N.W.2d 44 (N.D. 1957) a downstream landowner objected to the township installing a culvert to pass flows in a road that had been reconstructed 23 years earlier without a culvert. 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.

In my June 2001 opinion, the Attorney General stated:

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.

2001 N.D. Op. Att'y Gen. L-21.

Under the rationale set out in the June 2001 opinion, it is my opinion that a prescriptive right cannot be obtained against the land that would be inundated by reconstruction of the dam at the outlet of Russell Lake because it was constructed without the permit required by N.D.C.C. § 61-16.1-38 and its predecessors.

Sincerely,

Wayne Stenehjem
Attorney General

jak/vkk