

**LETTER OPINION**  
**2004-L-58**

September 14, 2004

Mr. Kent Vesterso  
Towner County Water Resource District  
Towner County Courthouse  
Cando, ND 58324

Dear Mr. Vesterso:

Thank you for your letter regarding the North Dakota Department of Transportation's ("Department") acquisition of mitigation acreage in your county. You asked why the Towner County Water Resource District is not notified of proposed acquisitions and whether the Governor and local county commissioners must approve all wildlife or perpetual easements on wetlands. It is my opinion that the Department is not required by law to notify or seek approval from the water resource district or county commission for wetland mitigation bank acquisitions.

The Department advises that it is required by federal law to establish wetland mitigation to compensate for impacts incurred to wetlands as a result of highway projects.<sup>1</sup> When the Department acquires property for mitigation, it acts under N.D.C.C. § 24-01-18. This law authorizes the Department to purchase or condemn any lands as part of the cost of constructing a state highway project which the director deems necessary for public use.<sup>2</sup> Section 24-01-18, N.D.C.C., contains no requirements that the Department

---

<sup>1</sup> Specifically, mitigation banks are used to satisfy the requirement for compensatory wetland mitigation for transportation projects under Section 404 of the Clean Water Act, 33 U.S.C. 1251, et. seq. See also 23 C.F.R. § 777 ("Mitigation of Impacts to Wetlands and Natural Habitat.").

<sup>2</sup> Section 24-01-18, N.D.C.C., does not specifically state that land may be acquired for wetlands mitigation, but does permit the Department to acquire land, or rights in land, for highway purposes. This provision has been interpreted broadly to encompass the acquisition of land for purposes relating to highways and the convenience of travelers, not just the physical highway itself. Tormaschy v. Hjelle, 210 N.W.2d 100, 103-4 (N.D.1973) (highway rest areas, including sewage facilities related to the rest area). This office reached a similar opinion regarding the use of county highway funds in determining that a county may use highway funds to purchase equipment. N.D.A.G. 84-18. Accordingly, a broad interpretation of N.D.C.C. § 24-01-18 allowing the Department to acquire land or rights in land that is legally necessary to construct a highway is reasonable. N.D.A.G. Letter to Hjelle (May 12, 1977) is overruled to the extent it interpreted N.D.C.C. § 24-01-18 as not permitting the Department to acquire land for wetland mitigation purchases required by law.

LETTER OPINION 2004-L-58  
September 14, 2004  
Page 2

notify the water resource district, or otherwise obtain approval of mitigation wetlands from the district or the county commission.

Your question concerning county approval may stem from N.D.C.C. § 20.1-02-18.1, which provides that if the Governor or the Game and Fish Director receive acquisition proposals from the United States Department of Interior, these proposals are to be forwarded to the appropriate county for review and recommendation. On its face, the statute is inapplicable to acquisitions by the Department. The statute applies only where the Governor or Game and Fish Director have been given, by "federal law," authority to give "final approval" to an acquisition by the Interior Department. Because the Department is acting under N.D.C.C. § 24-01-18, N.D.C.C. § 20.1-02-18.1 does not apply. See State v. Paulson, 2001 ND 82, ¶ 9, 625 N.W.2d 528 ("When a statute is clear and unambiguous on its face, we will not disregard the letter of the statute under the pretext of pursuing its spirit").

Therefore, it is my opinion that the Department is not required by law to seek the water district or county commission's approval for mitigation bank acquisitions.

Sincerely,

Wayne Stenehjem  
Attorney General

ms/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).