

**LETTER OPINION
2006-L-23**

August 16, 2006

The Honorable Todd Porter
State Representative
4604 Borden Harbor Drive
Mandan, ND 58554-7961

The Honorable Mark Dosch
State Representative
509 Cottonwood Loop
Bismarck, ND 58504-7411

The Honorable Ed Kringstad
State Senator
1807 North 7th Street
Bismarck, ND 58501-1807

Dear Rep. Porter, Rep. Dosch, and Sen. Kringstad:

Thank you for your letter asking three questions concerning Lake Isabel and the effect that irrigation from the Kidder County aquifer system has on the lake's water elevation. It is my opinion that using Lake Isabel's waters for recreation is not protected as a prior water appropriation under N.D.C.C. § 61-04-06.3. It is my opinion that the public trust doctrine, which protects such public interests as recreation, does not, as the doctrine is presently articulated in North Dakota law, require the State Engineer to limit the water being appropriated under existing water permits. It is my further opinion that the State Engineer must consider the interests protected by N.D. Const. art. 11, § 27, regarding preservation of the state's fishing heritage, when issuing water appropriation permits.

ANALYSIS

I. Background.

Lake Isabel is a shallow Kidder County lake and, like many North Dakota lakes, it fluctuates greatly over time. The lake was essentially dry during the 1930s and

experienced high water threatening damage to property in 1950, 1987, and 1996.¹ The lake's "normal" water surface elevation is 1728.3 feet above mean sea level.² At this elevation, Lake Isabel covers approximately 773 acres, has a storage capacity of 4,751 acre-feet, and an average depth of about 6 feet, with a maximum depth between 12 to 15 feet.³

Lake Isabel is hydrologically connected to the Kidder County aquifer system. The primary consumptive use from the aquifer is for farmland irrigation. The Lake Isabel area has experienced below normal precipitation for the past five years.⁴ While precipitation, evapotranspiration, and the consumptive use of water all contribute to fluctuations in the aquifer system, the predominant factor affecting Lake Isabel's level is climate.⁵

Although Lake Isabel is a small, shallow lake, it receives significant recreational use. There are 281 lots around Lake Isabel, 254 of which have houses.⁶ These 254 parcels have a value of about \$10.5 million⁷ and generate about \$155,000 in property taxes.⁸ Cabin owners enjoy recreation at Lake Isabel, including swimming, boating, and fishing. The public has access via a county park.⁹ Although the North Dakota Game and Fish Department stocks the lake, fish are subject to winter kill,¹⁰ and the lake is not known as a consistent fishing lake.

¹Letter from Robert Shaver, Dir., Water Appropriations Div., State Water Commission, to Representative Todd Porter at 3 (Nov. 8, 2005); Attachment to Letter from Mr. Shaver to Matt Sagsveen (Apr. 12, 2006); see also State Water Commission, Preliminary Engineering Report, Lake Isabel Water Management at 3, 11 (June 1992) ("Preliminary Report").

² Preliminary Report at 9.

³ Id. at 9, 11.

⁴ See Palmer Drought Severity Index, North Dakota-Division 05: 1895-2005; Parkin Memo at 5.

⁵ Memo from Scott Parkin, Hydrologist, to Dale L. Frink, State Engineer, and Robert Shaver, Dir., Water Appropriation Div. (Oct. 7, 2005) ("Parkin Memo"); Preliminary Report at 15-19; e-mail from Scott Parkin (July 11, 2006).

⁶ Letter from Larry Knudson, Research Analyst, to Robert Shaver (Mar. 13, 2006) (citing Vicki Murray, Kidder County Treasurer's Office).

⁷ Id.

⁸ Conversation with Kidder County Treasurer, Mary Magstadt.

⁹ Conversation with Kidder County Auditor, Ruth Graf.

¹⁰ Conversation with Greg Power, Fisheries Chief, North Dakota Game and Fish Department. Stocking efforts from 1996-2005 include 221,300 northern pike and 52,300 yellow perch, costing about \$17,440. During that same period the Game and Fish Department also contributed \$20,150 to construct a vault toilet, dock, road upgrade, and parking lot. Id.

The State Engineer has issued 51 water permits allowing 10,869 acres to be irrigated with water from the Kidder County aquifer system, water that can influence Lake Isabel elevations.¹¹ In 2002, an average gross receipt per irrigated acre was \$747.¹² Assuming that all acres were irrigated in 2002, the value of irrigated crops is nearly \$8.2 million. Also, the market value of irrigated land is higher than non-irrigated land. No water permits have been issued since 1999 due to falling aquifer levels, and action has been deferred on six applications to appropriate water for irrigation in the Lake Isabel area.¹³

II. Prior Appropriation Rights at Lake Isabel.

You ask whether either the State Game and Fish Department or Lake Isabel lot owners hold a water right that protects the lake's fish, wildlife, and other recreational uses. A right to appropriate water is obtained by following the procedures in N.D.C.C. § 61-01-01. Water appropriations require the construction of "works" by which water is diverted and put to a beneficial use.¹⁴ All "works" require a permit from the State Engineer, with one exception.¹⁵ "Works" for domestic, livestock, or recreational uses that retain less than 12½ acre-feet do not require a permit. The State Engineer, however, must be notified of such works.¹⁶ Though not required to be permitted, such smaller appropriations are entitled to a priority date in the appropriation system.¹⁷ All other appropriations require a permit from the State Engineer.¹⁸

According to the State Engineer's office, the state has not granted any permits to appropriate water in or from Lake Isabel.¹⁹ And since all appropriations require "works" – even those not needing a water permit – my staff inquired whether any have been constructed at the lake. There are no such "works."²⁰ Thus, it is my opinion that at Lake Isabel no water rights exist for fish, wildlife, and other recreational uses.

¹¹ Parkin Memo at 9.

¹² Tom Scherer, North Dakota State University, Agriculture Extension Service, Value of Irrigated Agriculture in Kidder County, 2002 Crop Year (citing North Dakota Ag Statistics Service and Farm Service Agency).

¹³ Parkin Memo at 9.

¹⁴ N.D.C.C. § 61-04-01. See also N.D.A.C. § 89-03-01-07.

¹⁵ N.D.C.C. § 61-04-02.

¹⁶ N.D.C.C. § 61-04-02.

¹⁷ Id.

¹⁸ Id.

¹⁹ Conversation with Robert Shaver, Dir., Water Appropriations Div., State Water Commission.

²⁰ Id.

III. The Public Trust Doctrine.

You ask whether the public trust doctrine requires the State Engineer to limit prior appropriators' water use to an amount less than or equal to an aquifer's recharge rate.²¹ The public trust doctrine is a common law tool originally developed to limit legislative discretion to alienate property.²² The North Dakota Supreme Court expressly adopted the public trust doctrine in United Plainsmen Association v. State Water Conservation Commission,²³ holding that the "discretionary authority of state officials to allocate vital state resources" is limited by their obligation to hold such resources in trust for the benefit of the people.²⁴ The doctrine was first clearly defined in Illinois Central Railroad Company v. Illinois,²⁵ where the Illinois Legislature attempted to convey virtually all of Chicago's lakefront to a railroad. The conveyance was invalid because: "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."²⁶

The United Plainsmen court, citing the state constitution²⁷ and statute,²⁸ adopted the public trust doctrine: "[t]he ownership of the navigable waters . . . is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental, and [generally] cannot be alienated."²⁹ The public trust doctrine

²¹ You also ask whether the State Engineer may, by permit, allow a lake held in trust "to be drained." There is no indication that Lake Isabel is anywhere close to becoming dry. The question is thus speculative if not entirely hypothetical. This office generally does not issue opinions on hypothetical questions.

²² Most authorities credit Joseph L. Sax for reviving interest in the public trust doctrine with his article, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).

²³ 247 N.W.2d 457 (N.D. 1976).

²⁴ Id. at 460.

²⁵ 146 U.S. 387 (1892).

²⁶ Id. at 452.

²⁷ 247 N.W.2d at 461 (citing N.D. Const., art. XI, § 3 ("[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes")).

²⁸ Id. (citing N.D.C.C. § 61-01-01 ("[a]ll waters within the limits of the state . . . belong to the public and are subject to appropriation for beneficial use")).

²⁹ Id. (quoting Illinois Central Railroad, 146 U.S. at 455-56). Exceptions to the inability to alienate public trust property exist where the property is used to improve the public interest, or where the property can be "disposed of without detriment to the public interest in the lands and waters remaining." Id.

applies to navigable waters and hence to Lake Isabel because, according to the State Engineer, the lake is navigable.³⁰

The doctrine is commonly held to protect public interests in hunting and fishing, swimming, boating, and general recreation in the allocation of trust resources.³¹ Such public trust interests are also expressed by N.D.C.C. § 61-04-06(4)(c), which provides that the State Engineer must consider the effects of a permit on “fish and game resources and public recreational opportunities.” The North Dakota public trust doctrine also protects “irrigation, industrial and other water supplies.”³² While the doctrine is often applied to protect more general public interests in streams and lakes, such as maintaining lands in their natural state³³ or protecting aesthetics and scenic beauty,³⁴ the practical import of the doctrine is to impose on the State Engineer a planning requirement and a duty to take the public interest into account in allocating and managing this most important public resource – water.³⁵ The doctrine, however, does not prevent development, but rather imposes, at a minimum, a planning requirement in order that resource development is intelligent and controlled.³⁶ Applying the doctrine cannot occur in the abstract, but rather requires a careful gathering and assessment of facts. Balancing competing public interests is a policy-laden, fact-specific, and

³⁰ In re Application of Wildfang, State Engineer Administrative Order 99-7 (Sept. 22, 1999).

³¹ Parks v. Cooper, 676 N.W.2d 823, 839; Friends of Hatteras Is. v. Coastal Resources Comm'n, 452 S.E.2d 337, 348 (N.C. Ct. App. 1995); State v. Sorensen, 436 N.W.2d 358, 363 (Iowa 1989); Orion Corp. v. State, 747 P.2d 1062, 1073 (Wash. 1987); Shokal v. Dunn, 707 P.2d 441, 451 (Idaho 1985); Montana Coalition for Stream Access Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984); Wisconsin's Env'tl. Decade, Inc. v. Dep't of Natural Resources, 271 N.W.2d 69, 72 (Wis. 1978); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Nelson v. DeLong, 7 N.W.2d 342, 346 (Minn. 1942). See also N.D.A.G. 2005-L-01.

³² J.P. Furlong Enterprises, Inc. v. Sun Explor. & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988).

³³ N.D.A.G. 2005-L-01 (citing In re Water Use Permit Applications, 9 P.3d 409, 448-449 (Hawaii 2000)).

³⁴ United Plainsmen, 247 N.W.2d at 462 (citing Payne v. Kassab, 312 A.2d 86, 93 (Penn. 1973)). See also N.D.A.G. 2005-L-01 (citing United States v. State Water Res. Control Bd., 227 Cal.Rptr. 161, 201 n.41 (Cal. Ct. App. 1986)); Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improv. Dist., 733 P.2d 733, 737 (Idaho 1987); United States v. 1.58 Acres, 523 F.Supp. 120, 122 (D. Mass. 1981); Wisconsin's Env'tl. Decade, 271 N.W.2d at 72; Clafin v. State, 206 N.W.2d 392, 398 (Wis. 1973).

³⁵ United Plainsmen, 247 N.W.2d at 463 (referencing the Environmental Law Enforcement Act, N.D.C.C. ch. 32-40).

³⁶ United Plainsmen, 247 N.W.2d at 462, 463. See also In re Stone Creek Channel Improvements, 424 N.W.2d 894, 903 (N.D. 1988).

quintessentially governmental function, one left to the State Engineer's reasoned discretion.³⁷

United Plainsmen, however, did not discuss reallocating to public use waters appropriated for private use under a state water permit. A case that did is National Audubon Society v. Superior Court.³⁸ The California Supreme Court held that the public trust doctrine may require the state to curtail existing appropriations that impair trust uses of navigable waters.³⁹ The court rejected an argument that trust uses must always prevail over existing appropriations, concluding that the state retains the power to permit an appropriator to take water even though the taking may harm trust uses,⁴⁰ though the state must take the public trust into account and must protect trust uses "whenever feasible."⁴¹ The court thought it inappropriate to decide what was feasible on the facts, but stated that some responsible body needed to decide the question.⁴² In North Dakota, the State Engineer is generally⁴³ that official.

In United Plainsmen, the court recognized that in other states, the public trust doctrine was assuming an expanding role in environmental law.⁴⁴ The court, however, said:

No one has suggested the need for such an expansive application of the Public Trust Doctrine here. Confined to traditional concepts, the Doctrine confirms the State's role as trustee of the public waters. It permits alienation and allocation of such precious state resources only after an analysis of present supply and future need. . . .

[W]e think the Public Trust Doctrine requires, as a minimum, evidence of some planning by appropriate state agencies and officers in the allocation of public water resources⁴⁵

³⁷ National Audubon Society v. Superior Court, 658 P.2d 709, 732 (1983) ("We do not dictate any particular allocation of water. . . . The human and environmental uses of Mono Lake – uses protected by the public trust doctrine – deserve to be taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them.").

³⁸ 658 P.2d 709 (1983). The case is cited 875 times by other courts and discussed in over 250 law review articles.

³⁹ Id. at 728.

⁴⁰ Id. at 712, 727.

⁴¹ Id. at 728.

⁴² Id. at 729.

⁴³ The State Water Commission may reserve the right to approve certain water permits. N.D.C.C. § 61-04-06.

⁴⁴ United Plainsmen, 247 N.W.2d at 463.

⁴⁵ Id.

Unlike California, neither United Plainsmen nor any other North Dakota court decision imposes a public trust obligation on the state to continually review vested water rights to determine if they require adjustment. Our courts could, of course, someday set such a requirement, but it is premature to identify such a duty under North Dakota's public trust doctrine.

IV. Preservation of the State's Fishing Heritage.

You also ask how N.D. Const. art. XI, § 27 implicates water appropriations. The provision states:

Hunting, trapping, and fishing and the taking of game and fish are a valued part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good.

A sponsor of the resolution that led to this provision testified that in other states animal rights groups were initiating movements to limit hunting, fishing, and trapping privileges.⁴⁶ The sponsor testified that the constitutional amendment proposed was a preemptive strike against such measures.⁴⁷ Thus, the intent of the provision may not have been to impose any affirmative duties on state officials or to compromise or broaden their regulatory responsibilities. But the language does provide that "hunting, trapping, and fishing and the taking of game and fish are a valued part of our heritage and will be forever preserved for the people." It must be given some role in the work of state officials.

The waters of North Dakota are an integral part of the state's natural environment. They are vital to the wildlife habitat. The State Engineer, in managing the state's waters, cannot ignore a constitutional provision that seeks to protect interests so closely related to water. The State Engineer must consider the provision when deciding whether to grant water permits and when carrying out planning responsibilities.

This should not be a novel requirement. Although the provision became a part of our constitution only recently,⁴⁸ a statute has long required the State Engineer to consider, in the permitting process, interests closely related to those in N.D. Const. art. XI, § 27. The State Engineer must consider the "public interest," a duty that includes the

⁴⁶ Hearing on H.C.R. 3018 Before the Senate Comm. on Natural Resources, 1999 N.D. Leg. (Mar. 11) (Testimony of Rep. Belter).

⁴⁷ Id.

⁴⁸ The section was adopted on November 7, 2000. See 1999 N.D. Sess. Laws ch. 572, § 1; 2001 N.D. Sess. Laws ch. 593. The section became effective November 7, 2000, pursuant to N.D. Const. art. IV, § 16.

proposed appropriation's "effect on fish and game resources and public recreational opportunities."⁴⁹

Whether the State Engineer gives adequate consideration to interests protected by the constitutional provision depends on the facts. Thus, the question you ask – "what consideration is required" – cannot be answered in the abstract. One factor would be the nature of the body of water in question and its place as a hunting, trapping, and fishing destination.

The Game and Fish Department classifies state waters based on their fishing value. Fifty water bodies (lakes, rivers, and reservoirs) have a higher protection and maintenance priority than Lake Isabel, and 250 water bodies have equal priority.⁵⁰ North Dakota fishing opportunities are widespread and provide satisfactory, if not excellent, fishing. It is unlikely that a court would interpret N.D. Const. art. XI, § 27, so strictly as to prohibit any action that has an adverse effect on fishing at Lake Isabel. The state's sporting heritage is not necessarily compromised by a state action that may adversely affect water elevations and hence recreation at one lake.

Sincerely,

Wayne Stenehjem
Attorney General

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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.⁵¹

⁴⁹ N.D.C.C. § 61-04-06(4).

⁵⁰ The North Dakota Game and Fish Department has a three-tier approach to managing the state's fisheries. Power, supra n.10. Tier 1 and 2 water bodies have the highest priority and require annual monitoring/sampling and active fish management. Id. There are approximately 50 Tier 1 and 2 water bodies. Id. Tier 3 water bodies are all other managed lakes/reservoirs/rivers and currently number around 250. Id. Tier 3 water bodies are not routinely sampled, and fish management is often limited to stocking efforts only. Id. Infrastructure (ramps, roads, etc.) is addressed if there is an active local sponsor. Id. Lake Isabel is a Tier 3 water body. Id.

⁵¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).